No.

IN THE

Supreme Court of the United States

ALFRIEDA S. CONNOR SCOTT, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD CONNOR,

Petitioner,

v.

MICHAEL JOHANNS, SECRETARY OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

JOSEPH D. GEBHARDT
CHARLES W. DAY, JR.
REBECCA M. HAMBURG
GEBHARDT & ASSOCIATES, LLP
1101 17th Street, N.W.
Washington, DC 20036
(202) 496-0400

SCOTT L. NELSON
Counsel of Record
DAVID C. VLADECK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-1000

Attorneys for Petitioner

September 2005

QUESTION PRESENTED

Whether a federal employee who prevails in administrative proceedings brought under Title VII and obtains a final agency action declaring that an agency is liable for discriminating against him, but who receives an inadequate remedy, may bring an action in court challenging the remedy without also having to relitigate the question of liability de novo.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Regulations:

Other:

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alfrieda S. Connor Scott respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. This case presents the question whether a federal employee who prevails in administrative proceedings brought under Title VII and obtains a final agency order finding that his employing agency is liable for discriminating against him, but who receives an inadequate remedy in the administrative process, may bring an action in court challenging only the remedy. The D.C. Circuit held that Title VII does not permit a challenge to the remedy awarded in the administrative proceedings. The court held instead that Title VII requires the employee to start all over again in federal court and relitigate the liability issue on which he prevailed in the agency proceedings before he may raise issues about the proper remedy for the agency's unlawful discrimination. In so holding, the court expressly disagreed with holdings of the Fourth and Ninth Circuits, and, though the court did not acknowledge it, created a conflict with holdings of the Sixth and Second Circuits as well. The Court should grant review to resolve the conflict and correct the distortion of Title VII's remedial framework created by the decision below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 409 F.3d 466 (D.C. Cir. 2005) and is reprinted in the Appendix at 1a. The unreported decision of the United States District Court for the District of Columbia is reprinted in the Appendix at 10a.

JURISDICTION

The court of appeals entered judgment on June 3, 2005. On August 4, 2005, the Chief Justice extended the time for filing this petition to and including September 16, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title 42 U.S.C. § 2000e-16(c) provides:

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

STATEMENT OF THE CASE

A. The Procedural Framework

Claims of employment discrimination by federal employees follow a procedural path different from similar claims against private-sector employers. The procedures established by statute and implementing regulations for claims by federal workers both enhance the authority of the Equal Employment Opportunity Commission by giving it the power to make de-

cisions that are binding on federal agencies and preserve the right of employees to have full access to the federal courts to litigate their claims if they so choose. A brief summary of the administrative/judicial scheme is necessary to place the question presented in context.

1. The Administrative Process. A federal employee who wishes to make a Title VII claim must first attempt to resolve the claim informally by consulting an EEO counselor. 29 C.F.R. § 1614.105. If counseling proves unsuccessful, the employee must file a formal complaint with the agency. 29 C.F.R. § 1614.106. The agency must then investigate the claim and, after no more than 180 days of investigation, provide the complaining employee with a copy of the investigative file and notify him of his right to request a hearing. 29 C.F.R. § 1614.108. If the employee requests a hearing, the EEOC appoints an administrative judge who hears the claim, issues a decision, and orders appropriate remedies. 29 C.F.R. § 1614.109.

The administrative judge's order becomes the employing agency's final action on the complaint unless, within 40 days, the agency issues a final order of its own. 29 C.F.R. §§ 1614.109(i), 1614.110(a). The agency's final order must state whether the agency will fully implement the administrative judge's decision. If the agency's final order does not fully implement the administrative judge's decision, the agency must also appeal the administrative judge's decision to the appellate office at the EEOC. 29 C.F.R. §1614.110(a).

If the employee is unsatisfied with the agency's final action, he may elect to appeal to the EEOC. 29 C.F.R. § 1614.401(a). Upon an appeal to the EEOC by the employee, the agency, or both, the EEOC renders a final decision, which is binding on the agency. 29 C.F.R. §§ 1614.405, 1614.502(a). The regulations establishing the procedural scheme thus give effect to the statutory command that the EEOC "enforce" the provisions of Title VII against federal

agencies "through appropriate remedies." 42 U.S.C. § 2000e-16(b).

2. Judicial Remedies. The government is never permitted to seek judicial review of a final EEOC or agency action in a Title VII case. By contrast, under 42 U.S.C. § 2000e-16(c), a federal employee who seeks judicial resolution of his Title VII claim has a number of different litigation options. First, if more than 180 days have passed since the filing of a formal complaint and the agency has not yet taken final action, the employee may bypass completion of the administrative process and litigate his claim in court. 29 C.F.R. § 1614.407(b). Second, if the agency takes a final action with which the employee is not satisfied, he may go directly to court, forgoing the optional EEOC appeal. 29 C.F.R. § 1614.407(a). Third, if the employee chooses to appeal to the EEOC, he may nonetheless proceed to court if the EEOC does not decide the appeal within 180 days. 29 C.F.R. § 1614.407(d). Fourth, the employee may sue if the final decision of an appeal by the EEOC is adverse to him. 29 C.F.R. § 1614.407(c). Finally, if the employee prevails before the EEOC but his agency fails to provide the remedies ordered by the EEOC, the employee may bring an action to enforce the EEOC's order. 29 C.F.R. §§ 1614.502(a), 1614.503(g).

Despite the different stages in the procedure at which these judicial remedies may be sought, the underlying statutory authority for each of them is the same: 42 U.S.C. § 2000e-16(c), which provides that the aggrieved employee "may file a civil action as provided in section 2000e-5 of this title." Section 2000e-5 is the provision of Title VII that authorizes actions in court against private employers.

When an employee files a civil action under § 2000e-16(c) prior to a final agency or EEOC action on his complaint, the federal court in which the action is filed necessarily must determine for itself whether unlawful discrimination has occurred and, if so, the proper remedy. Similarly, this Court held in *Chandler v. Roudebush*, 425 U.S. 840 (1976),

that when an employee files a civil action following a final agency (or EEOC) determination that there has been no violation of Title VII, he is entitled to a de novo determination by the court on the merits of his claim. On the other hand, the federal courts agree that when an employee brings an action under § 2000e-16(c) to enforce his entitlement to a remedy ordered by the EEOC (or the employing agency in an unappealed final order), he is *not* required to relitigate the issue of liability on a de novo basis in the district court. *See, e.g., Moore v. Devine*, 780 F.2d 1559, 1563 (11th Cir. 1986).

But what if the employee has prevailed on the issue of liability in the agency proceedings, but files an action under § 2000e-16(c) only because he is aggrieved by the insufficiency of the *remedy* ordered in the final agency or EEOC action? Must he then relitigate the issue of *liability* de novo, as if he were a plaintiff in the *Chandler v. Roudebush* situation, or may he hold the agency to the administrative finding of liability, as in the *Moore v. Devine* situation, and seek review limited to that aspect of the administrative action to which he objects—the remedy? That is the question posed by this case, and it is one on which the circuits are sharply divided.

B. The Proceedings Below

The petitioner, Alfrieda S. Connor Scott, is the personal representative of the estate of Harold Connor, a longtime employee of the Department of Agriculture. Mr. Connor was part of a large group of African-American employees who filed an administrative complaint against the Department alleging both classwide and individual claims of racial discrimination under Title VII.

Mr. Connor had joined the Department in 1974, and served as County Executive Director of the Department's Agricultural Conservation and Stabilization Service in Missouri. In the early 1980s, Mr. Connor was recruited to join the Department's management in Washington, D.C., and by

the mid-1990s he had risen through the ranks to a GS-14 position. Racial discrimination halted his progress, however, when the Department refused to promote him to the position of Director of Audits at its Farm Services Agency, instead selecting a less qualified white candidate for that position.

Although they could have gone to court once their complaint had been pending unresolved for the statutorily prescribed period, Mr. Connor and the other complainants chose to stay with the administrative process and requested a hearing before an EEOC administrative judge. At the hearing, Mr. Connor presented a prima facie case of discrimination in the failure to promote him. The government did not provide any explanation (let alone a legitimate, nondiscriminatory one) for its refusal to promote Mr. Connor and did not even call the official who made the decision as a witness. The administrative judge accordingly found that she "must conclude that the agency discriminated against Connor on the basis of his race" when it failed to promote him (though the judge rejected certain other claims of discrimination). J.A. 47.[1]

At a further hearing on the issue of remedy, Mr. Connor presented extensive evidence that the stress caused by his discriminatory treatment had contributed to the development of high blood pressure and severe kidney disease, with further complications resulting from the medications he was required to take for those conditions—conditions that later killed him. He sought compensatory damages for these injuries. Although EEOC precedents supported the award of significant damages based on similar evidence, the administrative judge found that Mr. Connor was entitled to a promotion to GS-15, back pay, attorneys' fees, and only $10,000 in damages based on emotional harm.

The Department thereafter issued a final agency action implementing all of the administrative judge's findings as to

---

[1] "J.A." refers to the Joint Appendix filed in the D.C. Circuit.

liability (both favorable and unfavorable to Mr. Connor) and awarding the relief recommended by the administrative judge. After setting forth the basis of the administrative judge's findings, the order recited: "It is the final action of the USDA to fully implement the EEOC AJ's decision finding discrimination and the ORDERED corrective relief on the Complainant's individual claim with respect to his non-selection to the position of Director of Audits and Investigations Group." J.A. 101.

Mr. Connor appealed the damages award to the EEOC, which, without explanation, declined to overturn the agency's final action concerning Mr. Connor's damages.[2] After Mr. Connor died from kidney-related cancer, petitioner Alfrieda S. Connor Scott, as representative of his estate, then filed this action in the United States District Court for the District of Columbia challenging the adequacy of the relief awarded in the administrative proceedings, but not the findings as to liability. The action invoked the district court's federal question jurisdiction under 28 U.S.C. § 1331.

The district court granted summary judgment to the government, holding that a plaintiff may not bring a judicial challenge to an agency's remedial award in a Title VII case, but must, if unsatisfied with the administrative resolution of the case, prove liability de novo before the court can consider remedies. The district judge relied entirely on his written opinion issued in *Herron v. Veneman*, 305 F. Supp. 2d 64 (D.D.C. 2004), a separate case brought by one of Mr. Connor's co-plaintiffs in the administrative proceedings.

In *Herron*, the court had noted that a plaintiff who files an action challenging an EEOC finding that an agency did

---

[2] Simultaneously with Mr. Connor's appeal of his individual damage award, the class appealed the Department's final action dismissing class-wide claims. The EEOC reversed and remanded the Department's treatment of the class claims, but did not specifically address Mr. Connor's damages claim and later denied his reconsideration request. J.A. 88, 107.

not violate Title VII receives de novo review of his entire Title VII claim under *Chandler v. Roudebush*, while a plaintiff seeking judicial review only of an agency's failure to provide a Title VII remedy awarded in administrative proceedings need not relitigate liability under the widely accepted holding of *Moore v. Devine*. *Id.* at 74-75. As the court observed, this dichotomy "leaves, however, a lacuna," *id.* at 75, because it "assumes either that a plaintiff is entirely satisfied with the agency's remedy, and seeks to enforce all of it, or that he is entirely unsatisfied, and seeks to challenge all of it." *Id.* The court acknowledged that "[b]etween Title VII and *Chandler*, it is not clear whether plaintiffs may challenge only part of a final agency determination" and that "*Chandler* is not directly on point because it emphasized ... a federal employee plaintiff's right to a trial de novo under § 2000e-16(c) and did not explain the scope of such a trial de novo." *Id.* The court further observed that "[t]here is a wealth of persuasive authority relevant to the issue before the court, but these cases are numerous, conflicting, and often confusing." *Id.* at 76. After canvassing the many appellate and district court opinions on both sides of the question, the court concluded that a plaintiff who challenges the remedy awarded in agency proceedings under Title VII must also prove liability de novo in court. *Id.* at 79.

Ms. Connor Scott appealed, and the D.C. Circuit affirmed. The court described the issue presented as "whether an employee who secures a final administrative disposition finding discrimination but who is dissatisfied with the remedy may challenge only the remedy in [a] federal court action." 409 F.3d at 468 (App. 1a-2a). The court acknowledged the correctness of the holding of *Moore v. Devine* (and other cases[3]) that a plaintiff challenging an agency's failure to implement a remedy ordered in administrative proceedings may

---

[3] *E.g., Wilson v. Pena*, 79 F.3d 154 (D.C. Cir. 1996); *Houseton v. Nimmo*, 670 F.2d 1375 (9th Cir. 1982).

bring a Title VII action to enforce the remedy without relitigating liability, and it recognized that *Chandler* holds only that "[i]n a Title VII suit *brought after a final administrative disposition finding no discrimination*, the district court considers the discrimination claim de novo." *Id.* at 469 (App. 4a) (emphasis added). Nonetheless, the court held that a plaintiff challenging only the remedy awarded in agency proceedings must "start from scratch," *id.* at 468 (App. 3a), because the part of Title VII that describes remedies that may be awarded by a court says the court may provide a remedy "[i]f the court finds" that the agency has discriminated—language that the court thought implied a requirement that the court find liability de novo. *Id.* at 469-70 (App. 5a) (quoting 42 U.S.C. § 2000e-5(g)(1)). The court did not explain why, if this were so, a court could provide relief to a Title VII plaintiff by enforcing an administrative award without first making its own finding of discrimination.

In addition, the court stated that its decision was consistent with *Chandler v. Roudebush*'s emphasis on Congress's desire to provide federal employees with the same ability to obtain a de novo trial of their Title VII claims that private sector employees have. *Id.* at 470 (App. 5a-6a) (quoting *Chandler*, 425 U.S. at 470). The court did not, however, attempt to reconcile its holding with the equally evident congressional policy decision to provide federal employees with a benefit not provided to private sector workers: namely, an administrative process whose results are binding on agency employers. *See* 42 U.S.C. § 2000e-16(b).

The court pointed out that its decision was consistent with the holding of the Tenth Circuit in *Timmons v. White*, 314 F.3d 1229 (10th Cir. 2003). The court acknowledged, however, that "*the Fourth and Ninth Circuits have arrived at the opposite conclusion.*" 409 F.3d at 470 (App. 6a) (emphasis added). It rejected the holdings of those circuits as "flawed" and their reasoning as filled with "defects." *Id.* at 470, 471 (App. 6a, 7a). In particular, the court expressly dis-

agreed with the reasoning and holdings of *Girard v. Rubin*, 62 F.3d 1244 (9th Cir. 1995), *Morris v. Rice*, 985 F.2d 143 (4th Cir. 1993), and *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), all of which hold that a Title VII plaintiff need not relitigate favorable liability rulings made in the administrative process merely because he is aggrieved by the remedy or some other distinct aspect of the agency's final action.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari to resolve a pronounced and spreading conflict among the circuits. The D.C. Circuit's opinion in this case, while consistent with decisions of the Third and Tenth Circuits, expressly conflicts with decisions of the Fourth and Ninth Circuits and is also irreconcilable with decisions of the Sixth and Second Circuits. Moreover, the D.C. Circuit's decision has no basis in the language of Title VII or in the decisions of this Court construing it, and has many anomalous policy implications, including its predictable effect of discouraging plaintiffs from pursuing the administrative process to its conclusion. The issue is a recurring one, as the number of appellate and district court opinions addressing it attests, and the conflict among the circuits requires particular attention from this Court because it involves circuits—in particular, the D.C., Fourth, and Ninth—where very large numbers of federal employees live and work. The nearly two hundred thousand civilian federal workers in the District of Columbia should receive the same procedural rights under Title VII as the approximately 275,000 in the neighboring states of Maryland and Virginia and the approximately 245,000 in California.

I. The Circuits Are Deeply Divided Over Whether a Federal Worker Who Brings a Title VII Action to Challenge the Remedy Awarded in Administrative Proceedings Must "Start From Scratch" and Prove Liability Anew.

As the D.C. Circuit acknowledged, its decision and those of the circuits that agree with it directly conflict with decisions of other courts of appeals. The D.C. Circuit, like the Tenth Circuit before it in *Timmons v. White*, 314 F.3d 1229, held that:

> Under Title VII, federal employees who secure a final administrative disposition finding discrimination and ordering relief have a choice: they may either accept the disposition and its award, or file a civil action, trying de novo both liability and remedy. They may not, however, seek de novo review of just the remedial award ....

409 F.3d at 471-72 (App. 8a-9a). Shortly after the D.C. Circuit's ruling, the Third Circuit weighed in on the same side, holding that "when a federal employee comes to court to challenge, in whole or in part, the administrative disposition of his or her discrimination claims, the court must consider those claims *de novo*, and is not bound by the results of the administrative process ...." *Morris v. Rumsfeld*, __ F.3d __, 2005 WL 2000955, at *5 (3d Cir. Aug. 22, 2005) ("*Rumsfeld*").[4]

Significantly, in reaching these holdings, both the Tenth and Third Circuits, like the D.C. Circuit, acknowledged that

---

[4] *Rumsfeld* involved a federal employee's claim of disability discrimination under the Rehabilitation Act, but that Act incorporates the Title VII remedial scheme established by 42 U.S.C. § 2000e-16. *See Rumsfeld*, 2005 WL 2000955, at *3 & n. 3 (quoting 29 U.S.C. § 794a(a)(1)). Thus, as the Third Circuit recognized, the issue in *Rumsfeld* was precisely the same as in this case and the other Title VII cases that have reached disparate results on this point.

their decisions created or widened a split among the circuits, and expressly disagreed with published decisions of one of more other federal courts of appeals. Thus, in *Timmons*, the Tenth Circuit stated that "[w]e recognize that several cases from other jurisdictions have concluded that a federal employee may litigate the remedy issue without submitting the question of discrimination to de novo review," but it rejected those opinions as "not persuasive." 314 F.3d at 1235. Similarly, the Third Circuit in *Rumsfeld*, understatedly observed that "[t]he relevant case law is not monolithic," and described the circuit precedents it rejected as "unpersuasive." *Rumsfeld*, 2005 WL 2000955, at *4, *5.

In particular, the D.C. Circuit, as well as *Timmons* and now *Rumsfeld*, specifically rejected the longstanding rule in the Fourth Circuit that, in a Title VII action brought by a federal worker to challenge the adequacy of remedies awarded in the administrative process, the employee need not relitigate the issue of liability. The Fourth Circuit first established that principle in *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), where it held that a federal employee was "entitled to greater relief than that granted by the EEOC," even though he had not proved his discrimination claim de novo in the district court. *Id.* at 710. The court reasoned that liability need not be shown anew because the federal defendants in such an action "are bound by the [administrative] findings of discrimination and retaliation." *Id.* at 711 n.3.

The Fourth Circuit reaffirmed the *Pecker v. Heckler* rule in *Morris v. Rice*, 985 F.2d 143 (4th Cir. 1993) (Niemeyer, J.), where the court once again entertained a Title VII action in which the plaintiff sought de novo review only of the remedy awarded in administrative process, not the underlying finding of unlawful discrimination. The court explained:

> The role of the EEOC in cases involving federal employees is different from its role in cases involving employees from the private sector. When Congress amended the Civil Rights Act in 1972 to include a

> cause of action for federal employees and applicants who were victims of discrimination, it provided that final decisions of the EEOC were to be binding on federal agencies. *See* Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e-16); *Moore v. Devine*, 780 F.2d 1559, 1562-63 (11th Cir.1986) (unless timely challenged, findings of the EEOC in federal employee cases are binding on the agency). On the other hand, the federal employee or applicant may file a civil action in court seeking de novo review. *See* 42 U.S.C. §§ 2000e-5, 2000e-16(c); *see Chandler v. Roudebush*, 425 U.S. [at] 861 .... *Furthermore, the plaintiff may limit and tailor his request for de novo review, raising questions about the remedy without exposing himself to a de novo review of a finding of discrimination. See Pecker v. Heckler*, 801 F.2d [at] 711 n. 3 ....

Id. at 145-46 (emphasis added; footnote omitted).

Pecker and *Morris* represent the law of the Fourth Circuit on this point and are regularly cited as such by district courts within that circuit.[5] As the D.C. Circuit acknowledged below (and as the Tenth and Third Circuits also recognized in *Timmons* and *Rumsfeld*), the holding that a federal employee cannot bring a Title VII action that challenges only the remedy he received in the agency proceedings cannot be reconciled with the established rule in the Fourth Circuit. There is a square and openly acknowledged conflict.

The D.C. Circuit's holding, as the court recognized, also conflicts with the Ninth Circuit's decision in *Girard v. Rubin*, 62 F.3d 1244 (9th Cir. 1995). In *Girard*, the court followed

---

[5] *See Thomas v. Potter*, 325 F. Supp. 2d 596, 603 (M.D.N.C. 2004); *Salazar v. Abraham*, 2003 WL 22902592, at *2 (D.S.C. Feb 03, 2003) *aff'd on other grounds*, 60 Fed. Appx. 955 (4th Cir. 2003); *Scott-Brown v. Cohen*, 220 F. Supp 2d 504, 506 (D. Md.), *aff'd*, 54 Fed. Appx. 140 (4th Cir. 2002).

the Fourth Circuit in holding that a federal employee who brings a Title VII action need not start from scratch and relitigate liability issues de novo, but may "tailor his request for relief" and seek de novo review only of those aspects of the final agency action that are unfavorable to him. *Id.* at 1247. *Girard* expressly relied on the Fourth Circuit's decision in *Morris*, *see id.*, and the D.C. Circuit specifically rejected *Girard*'s holding as "defect[ive]," *see* 490 F.3d at 471, as did the Third Circuit in *Rumsfeld*. *See* 2005 WL 2000955, at *5 n.11.[6]

Although the D.C. Circuit only acknowledged its disagreement with the Fourth and Ninth Circuits, the conflict in fact goes deeper. First, the D.C. Circuit's decision is also irreconcilable with the decision of the Sixth Circuit in *Haskins v. Department of the Army*, 808 F.2d 1192 (6th Cir. 1987). There the court held that a plaintiff who brings a Title VII action in court seeking additional remedies based on a final administrative finding need not litigate the issue of liability

---

[6] Unlike the D.C. Circuit, the Third Circuit characterized *Girard*'s ruling on this point as "dictum," but that is not correct. The Ninth Circuit's *holding* in *Girard* was that the plaintiff was entitled to the benefit of the EEOC's favorable determination on a statute of limitations issue because the court's de novo review was limited to those aspects of the administrative resolution of the Title VII claim that the plaintiff challenged. Indeed, the holding of *Girard* goes even beyond that of *Pecker* and *Morris*, in that *Girard* allowed a Title VII plaintiff to challenge *parts* of the agency's liability determination while at the same time retaining the benefit of parts of the agency's decision that were favorable to him. In a subsequent unpublished opinion, a panel of the Ninth Circuit held that there is a limit to this principle: *When a plaintiff seeks a de novo trial on liability*, the agency is not bound by administrative findings of fact that were favorable to the plaintiff. *See Friel v. Daley*, 230 F.3d 1366 (Table), 2000 WL 1208197 (9th Cir. 2000). Another Ninth Circuit panel, in a case where the issue was not presented, took note of the conflict between the Fourth Circuit's opinion in *Morris* and the Tenth Circuit's in *Timmons* without expressing an opinion on it (or noting that the Ninth Circuit had previously followed *Morris* in *Girard*). *See Farrell v. Principi*, 366 F.3d 1066, 1068 n.2 (9th Cir. 2004).

from scratch; rather, "*the factual findings underlying an administrative liability determination must be accepted by the district court if the plaintiff so requests.*" *Id.* at 1200 (emphasis added). While the court also noted that an administrative finding of liability does not "necessarily translat[e]" into an entitlement to additional remedies if it does not satisfy the prerequisites for such remedies, *id.*, the court expressly declined to hold that a plaintiff in such a situation must start from scratch, as the D.C. Circuit has now required.[7]

In addition, the D.C. Circuit overlooked the Second Circuit's decision in *Briones v. Runyon*, 101 F.3d 287 (2d Cir. 1996), which expressly "adopt[ed] the principle announced by the Ninth Circuit in *Girard*," *id.* at 291, namely, that the plaintiff in a Title VII action against a federal agency may hold the defendant agency to favorable aspects of final orders issued in the administrative process even while litigating other issues on a de novo basis. The court declined to give the agency "a second bite at the apple" to relitigate issues it lost at the administrative level merely because the plaintiff had filed a Title VII action contesting other issues on which he did not prevail in the agency proceedings. *Id.* at 291. Like the decisions of the Fourth, Ninth, and Sixth Circuits, the Second Circuit's decision in *Briones* is flatly inconsistent with the D.C. Circuit's holding in this case that (except in the enforcement of remedies context) a Title VII action brought by a federal employee is an all-or-nothing proposition in

---

[7] The Third Circuit characterized the decision in *Haskins* as involving only an action to enforce an agency remedial order, *see Rumsfeld*, 2005 WL 2000955, at *5, but that is an inaccurate characterization of the case. The D.C. Circuit, below, stated that the *Haskins* court had "no occasion" to determine whether liability findings were binding on the agency because of an agency concession of liability, *see* 409 F.3d at 471 (App. 7a), but that, too, is an incomplete description of the case. The district court in *Haskins* had found no liability despite the administrative findings and the agency concession; thus, the effect of the administrative findings was very much at issue in the case when it reached the Sixth Circuit.

which the employee must start from scratch in proving liability and entitlement to remedies.

The Seventh Circuit has also addressed the issue, though this Court vacated its opinion for another reason. In *Gibson v. Brown*, 137 F.3d 992 (7th Cir. 1998), *vacated sub nom. West v. Gibson*, 527 U.S. 212 (1999), the Seventh Circuit cited the Fourth Circuit's decision in *Morris* for the proposition that a federal employee may bring a Title VII action seeking additional relief (in that case, compensatory damages) while holding the agency to its finding of liability. *See id.* at 993-94. The court went on to consider whether, in such circumstances, the employee was required to exhaust his damages claim before the agency, a requirement the Seventh Circuit held was excused on the ground that compensatory damages could not be awarded in Title VII administrative proceedings. This Court vacated the Seventh Circuit's decision because it held that damages were available under Title VII in agency proceedings, and it remanded for a determination of whether the plaintiff had in fact satisfied the exhaustion requirement. 527 U.S. at 223.[8] Nothing in this Court's opinion, however, suggested any disapproval of the Seventh Circuit's view that the courts could entertain a Title VII claim seeking additional relief based upon an administrative finding of liability. Thus, although the Seventh Circuit's opinion in *Gibson* is vacated, it provides a further indication of the divergent approaches the circuits have taken to the issue and the need for guidance by this Court.

Finally, though it has not reached the precise issue posed by this case, the First Circuit has held that a federal employee who prevails in Title VII proceedings at the administrative level may bring an action under 42 U.S.C. § 2000e-16(c) seeking further relief in the form of attorneys' fees, without

---

[8] On remand, the Seventh Circuit held that the plaintiff had failed to exhaust. *Gibson v. West*, 201 F.3d 990 (7th Cir. 2000).

having to relitigate the underlying question of liability—a holding irreconcilable in principle with the decision below in this case. *See Fischer v. Adams*, 572 F.2d 406 (1st Cir. 1978) (cited with approval in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 61-62 n.2 (1980)). The First Circuit has also recognized that the rule in the Fourth and Ninth Circuits is that a federal employee may bring a Title VII action seeking additional substantive remedies without opening underlying liability issues to de novo review. In *Rivera-Rosario v. U.S. Dept. of Agriculture*, 151 F.3d 34, 37 (1st Cir. 1998), the court observed:

> [S]everal circuits have taken the view that a federal employee can sometimes initiate a district court action for relief under Title VII without making a *de novo* showing of discrimination. The paradigm case is one in which an employee, dissatisfied with the agency's resolution of the discrimination claim, invokes an alternative review procedure provided by the statute for federal employees, namely, to seek review of the agency's decision by the EEOC itself. *Cf.* 42 U.S.C. § 2000e-16(c). Alternatively, an agency might, at least in theory, decide a discrimination claim in favor of an employee, adopt a remedy, and then fail to carry through with its commitment.
>
> In some such cases, several circuits have indicated that the employee may be able, in the district court action, to rely upon whatever final agency determination has been secured and obtain enforcement from the district court without a *de novo* showing of discrimination or, in the alternative, argue that the district court should accept the finding of discrimination but provide even greater relief. This circuit has not previously addressed this issue, and we have no occasion to do so here.

In sum, the circuits are in open disagreement over the question presented here, and definitive resolution by this Court is needed.

II. The D.C. Circuit's Decision Is Not Compelled by the Terms of the Statute and Fails to Promote Congress's Objectives.

The D.C. Circuit's opinion asserts that its holding follows from the statutory language providing that an aggrieved federal employee may bring "a civil action," 42 U.S.C. § 2000e-16(c), and that a court may provide a remedy in an action "if the court finds" that the defendant has unlawfully discriminated. 42 U.S.C. § 2000e-5(g)(1). According to the court, those terms necessarily imply that the action must be one in which the court tries all issues of liability and remedy de novo.

But the court's reliance on statutory language is fatally undermined by its own acknowledgment that there is at least one circumstance where, in an "action" brought under 42 U.S.C. § 2000e-16(c), a plaintiff can obtain a remedy without a de novo liability determination by the court—namely, in the *Moore v. Devine* type of case, where the plaintiff sues under Title VII to enforce a final remedial order issued in the agency proceedings. *See* 409 F.3d at 469 (App. 4a) ("[C]omplainants who prevail in the administrative process but who—for whatever reason—fail to receive their promised remedy, may sue to enforce the final administrative disposition."); *see also Wilson v. Pena*, 79 F.3d at 157 (recognizing availability of action to enforce a Title VII award under 42 U.S.C. § 2000e-16(c)).[9] The court's acknowledgment that there are circumstances where a court may, in a Title VII civil action brought by a federal employee, provide a remedy without a de novo determination of liability negates any as-

---

[9] Similarly, the reasoning of the court below fails to explain why a federal employee can bring a Title VII action under § 2000e-16(c) seeking attorneys' fees for prevailing in administrative proceedings without having to relitigate liability. *See Fischer v. Adams*, 572 F.2d 406; *Booker v. Brown*, 619 F.2d 57 (10th Cir. 1980).

sertion that the statutory terms require an employee to start from scratch in every action brought under § 2000e-16(c).[10]

The court below also asserted that its holding flowed naturally from this Court's holding in *Chandler* that the legislation creating the Title VII remedial scheme for federal employees was designed to "treat private- and federal-sector employees alike" in respect to providing a right to de novo trial of their claims in federal court. 425 U.S. at 861. But to say that Congress intended to give federal employees the entitlement enjoyed by private-sector employees to proceed de novo on liability in federal court if they were unsatisfied with the outcome of administrative proceedings is not the same as saying that Congress *required* them to start from scratch in when they prevailed on liability in agency proceedings.

After all, Congress intended to and did provide federal employees with certain rights that go beyond those of private-sector employees—in particular, the right to receive *enforceable* remedies from the EEOC, which are *binding* on federal agencies. *See* 42 U.S.C. § 2000e-16(b); 29 C.F.R. § 1614.502(a) ("Relief ordered in a final Commission decision is mandatory and binding on the agency except as provided in this section."); *see also West v. Gibson*, 527 U.S. at 215, 217, 219 (describing EEOC powers with respect to claims by federal employees). Importantly, Congress did not

---

[10] Moreover, the court's assertion that 42 U.S.C. § 2000e-5(g)(1) necessarily requires a de novo judicial finding of liability overlooks three critical points: (1) that the provisions of § 2000e-5 only apply in actions by federal employees under § 2000e-16(c) "as applicable" in light of the different responsibilities of the EEOC with respect to claims by private employees and federal employees, *see Chandler*, 425 U.S. at 847; (2) that a court may in any event make a "finding" of liability based on the agency's final action finding such liability, *see Pecker*, 801 F.2d at 711 n.3.; and (3) that this Court held in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, that a federal court's remedial powers under 42 U.S.C. § 2000e-5, at least as respects attorneys' fees, are *not* limited to case where the court itself finds liability.

provide agencies the same ability to challenge unfavorable administrative outcomes that it gave employees. As this Court put it in *West*:

> The fact that Congress permits an employee to file a complaint in court, but forbids the agency to challenge an adverse EEOC decision in court, also suggests that Congress was not inordinately and unusually concerned with invoking special judicial safeguards to protect the government.

527 U.S. at 222. That an employee has exercised his right to challenge an element of the agency's resolution of his claim that aggrieves him does not, therefore, necessarily mean that the agency is now free to do indirectly what it cannot do directly: obtain judicial review of adverse liability (or remedial) findings that are otherwise binding on it.

Indeed, requiring a plaintiff to relitigate liability when the federal government itself has found that it violated Title VII permits the government to defend itself on grounds *contrary to the findings on which it based the final action that the plaintiff challenges*—a result directly at odds with "the well-established rule that an agency's action may not be upheld on grounds other than those relied on by the agency." *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 420 (1992) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)). That the standard of review for those aspects of the agency's action that the plaintiff chooses to challenge is de novo does not, as a matter of either logic or policy, suggest that the government should be free to defend itself on grounds directly contrary to its own findings.

The D.C. Circuit's ruling that all bets are off once the employee challenges any aspect of the final administrative resolution of his claim creates a number of perverse incentives for participants in the process that run contrary to Congress's object of "encouraging quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court." *West*, 527 U.S. at 219.

First, from the standpoint of complainants, participation in the complete administrative process is usually, as a practical matter, optional, because they are free to bring actions in court once 180 days have elapsed from the filing of an administrative complaint. Particularly in complex cases, final agency decisions are rarely reached within that time. Indeed, hearings before an EEOC administrative judge are often not even *begun*, let alone completed, within that period. In this case, for example, the complaint was filed in February 1997, the hearing did not begin until April 1999, and the final agency action was not taken until May 2000. Such delays are by no means unusual: In fiscal year 2004, the most recent period for which figures are available, the average time to reach a final agency action for all employment discrimination complaints by federal employees was 469 days, and the average time for resolution in cases that went to a hearing before an administrative judge was 743 days. *See* Equal Employment Opportunity Commission, *Annual Report on the Federal Work Force Fiscal Year 2004* § B, Table 15 (2005), at www.eeoc.gov/federal/fsp2004/section1b.html#7.

Thus, in the typical case, the plaintiff has the option of going to court without completing the administrative process. If plaintiffs know that, at the end of the day, if they have any disagreement with the outcome of the administrative process they must start from scratch in court, they will be far less likely to see the administrative process through to the end, and far more inclined to sue at the earliest opportunity (*i.e.*, as soon as the 180 days have run). Creating such an incentive substantially subverts the congressional policy, emphasized in *West*, of promoting resolution of claims at the administrative level.

The "start from scratch" rule may also encourage agencies to do what the Department of Agriculture seems to have done here: namely, sandbag the plaintiff by not asserting factual defenses to liability in the administrative proceedings, confident that it will have a second bite at the apple if the

plaintiff later brings an action in court to seek review of an inadequate remedy. By discouraging agencies from taking the administrative process seriously, as well as enabling them to use the threat of a de novo trial on liability as a bludgeon to force plaintiffs to accept inadequate remedies obtained through the administrative process, the D.C. Circuit's rule, again, undermines the statutory objective of creating a functional, efficient, and fair administrative process.

In short, the D.C. Circuit's rationale for its holding is highly suspect. By contrast, the terms of the statute, its structure, and its underlying objectives are fully consistent with the rule adopted by the Fourth, Ninth, Sixth, and Second Circuits, which permits judicial actions limited to those aspects of the final administrative resolution of a claim that actually aggrieve the plaintiff. The dubiousness of the D.C. Circuit's reasoning reinforces the need for resolution by this Court of the open and spreading conflict among the circuits.

III. The Issue Is a Recurring and Important One, and the D.C. Circuit's Ruling Subjects Tens of Thousands of Federal Workers to Different Treatment Depending on Where They Are Employed.

The question presented recurs frequently in Title VII actions brought by federal employees, as the number of cases where the issue has been decided at the federal appellate level demonstrates. If there were any doubt on that point, it is dispelled by the many other cases in which the issue has been addressed by federal district courts without leading to an appellate decision.[11] The divergent results reached by the dis-

---

[11] In addition to the cases from the Fourth Circuit cited in footnote 5 above, district court cases that have held, consistent with *Pecker*, *Morris*, and *Girard* that a federal employee-plaintiff need not relitigate favorable liability findings include: *Williams v. Herman*, 129 F. Supp. 2d 1281 (E.D. Cal. 2001); *Scully v. Summers*, 2000 WL 1234588, *15 (S.D.N.Y. Aug 30, 2000); *Malcolm v. Reno*, 129 F. Supp. 2d 1 (D.D.C. 2000); *Charles v. Dalton*, 1996 WL 53633 (N.D. Cal. Jan. 31, 1996); *Hashimoto*

(*Footnote continued*)

trict courts underscore the need for guidance from this Court that is already evident from the split among the circuits. More significantly, the number of cases in which the issue has arisen shows that the split among the circuits is not one affecting only a small number of cases or a few plaintiffs, but one that constantly arises as Title VII plaintiffs challenge unsatisfactory results in agency proceedings.

Guidance is particularly important because this is an issue that not only alters the outcomes of cases, but also fundamentally influences the way Title VII cases brought by federal employees are structured and litigated from start to finish. And, as explained above, determination of the issue will also have a significant impact on basic strategic choices litigants make about whether to see the administrative process through to completion, and whether—and when—to invoke judicial remedies.

In addition, the impact of the split among the circuits is magnified by the circuits involved, which include many of the jurisdictions with the largest concentrations of federal employees. The two jurisdictions with the most federal civilian employees as of 2002—California, with about 245,000, and the District of Columbia, with 189,000[12]—lie within cir-

---

v. Dalton; 870 F. Supp. 1544, 1557 (D. Haw. 1994) , *aff'd on other grounds*, 118 F.3d 671 (9th Cir. 1997); *Sorce v. Frank*, 1993 WL 29901, *3 (N.D. Ill. Feb. 08, 1993); *Evans v. Secretary of Energy*, 1990 WL 51921, at *2 (D.D.C. Jan. 30, 1990); and *Huey v. Bowen*, 705 F. Supp. 1414, 1418-1419 (W.D. Mo. 1989) , *aff'd on other grounds sub nom. Huey v. Sullivan*, 971 F.2d 1362 (8th Cir. 1992). District court decisions requiring relitigation include: *St. John v. Potter*, 299 F. Supp. 2d 125, 128 (E.D.N.Y. 2004); *Gaffney v. Potter*, 2002 WL 1008460, *4 (N.D. Ill. May 13, 2002); *Ritchie v. Henderson*, 161 F. Supp. 2d 437, 449 (E.D. Pa. 2001); *Simpkins v. Runyon*, 5 F. Supp. 2d 1347, 1348-49, 1350 (N.D. Ga.1998); and *Cocciardi v. Russo*, 721 F. Supp. 735, 737 (E.D.Pa.1989).

[12] These rounded figures, and the others cited in this paragraph, derive from an Office of Personnel Management table entitled "Geographic Distribution of Federal Civilian Employment Ranked by State with Trend Changes," www.opm.gov/feddata/geograph/2002/state_trend.xls.

cuits that have taken opposite approaches to the issue. Similarly, the effect of the circuit conflict is to provide the 143,000 federal employees in Virginia and the 133,000 in Maryland with judicial remedies under Title VII that are markedly different from those available to their neighbors in Washington, D.C. The approximately 175,000 federal employees in Pennsylvania, New Jersey, and Delaware will also receive different treatment not only from their Fourth Circuit neighbors but also from the 133,000 federal employees in New York and the 81,000 in Ohio. Accidents of geography should not determine the procedural rights available to federal workers, particularly where such large numbers of employees are potentially subject to different treatment. The Court should restore uniformity to this important area of federal law by granting review in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
DAVID C. VLADECK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

JOSEPH D. GEBHARDT
CHARLES W. DAY, JR.
REBECCA M. HAMBURG
GEBHARDT & ASSOCIATES, LLP
1101 17th Street, N.W.
Washington, DC 20036
(202) 496-0400

Attorneys for Petitioner

Date: September 2005

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 17, 2005 Decided June 3, 2005

No. 04-5267

ALFRIEDA S. CONNOR SCOTT, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD CONNOR,
APPELLANT

v.

MICHAEL JOHANNS, SECRETARY OF AGRICULTURE,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 03cv01560)

Charles W. Day, Jr. argued the cause for appellant. With him on the briefs was Joseph D. Gebhardt.

Charles W. Scarborough, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief were Peter D. Keisler, Assistant Attorney General, Kenneth L. Wainstein, U.S. Attorney, and Marleigh D. Dover, Special Counsel.

Before: GINSBURG, Chief Judge, and TATEL and GARLAND, Circuit Judges.

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, *Circuit Judge*: Under Title VII of the Civil Rights Act of 1964, federal employees dissatisfied with the administrative resolution of their discrimination complaints may file suit in federal court. In this case, we must decide whether an

employee who secures a final administrative disposition finding discrimination but who is dissatisfied with the remedy may challenge only the remedy in the federal court action. Answering no, the district court held that the employee must first prove liability, and we agree.

I.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., provides that before filing suit, an individual alleging that a federal agency engaged in employment discrimination must seek administrative adjudication of the claim. *See generally* 42 U.S.C. § 2000e-16. Under EEOC regulations promulgated pursuant to Title VII, the employee (or job applicant) files a complaint with the employing agency. 29 C.F.R. § 1614.106(a). The employing agency then conducts an investigation and, if the employee so requests, refers the matter to an EEOC Administrative Judge ("AJ") for a hearing. *Id.* §§ 1614.106(e)(2), 1614.108 -09. After the employing agency investigates or, if the employee requested a hearing, after the AJ issues a decision, the employing agency must "take final action." *Id.* § 1614.110. If the employee never requested a hearing, the employing agency's final action must "consist of findings ... on the merits of each issue ... and, when discrimination is found, appropriate remedies and relief." *Id.* § 1614.110(b). In cases where the employee requested a hearing, the employing agency's "final order shall notify the complainant whether or not the agency will fully implement the [AJ's] decision." *Id.* § 1614.110(a). Complainants dissatisfied with an employing agency's final action, whether or not issued after an AJ decision, have two options: they may either file suit or appeal to the EEOC. *See id.* § 1614.110. If a complainant takes the latter course, EEOC's Office of Federal Operations ("OFO") reviews the record, supplements it if necessary, and then issues a written decision. *Id.* § 1614.404-05. Like the employing agency's final action, the OFO's decision amounts to a final disposition, triggering the right to sue. *Id.* § 1614.405(b).

This case began in 1997 when Harold Connor and several other African-American employees of the Department of Agriculture ("DOA") filed a complaint alleging (among other things) denial of promotions on account of race. DOA referred the complaint to an AJ who found two claims meritorious: Connor's and that of another employee, Dr. Clifford Herron. After holding a hearing on remedy, the AJ awarded Connor and Herron GS-15 positions, back pay, attorneys' fees, and $10,000 each in compensatory damages. In separate final agency actions—one each for Connor and Herron—DOA accepted the findings of discrimination, as well as the remedies the AJ had awarded.

Following additional administrative proceedings not relevant to the issue now before us, Herron filed suit in the U.S. District Court for the District of Columbia challenging only the sufficiency of his $10,000 compensatory award. Although Connor is now deceased, Alfrieda Connor Scott, his former wife and the personal representative of his estate, filed a similar suit. Addressing Herron's suit first, the district court held that when a final administrative disposition finds discrimination and orders a remedy, the employee may not file suit challenging only the remedial award. *Herron v. Veneman,* 305 F. Supp.2d 64, 74-79 (D.D.C. 2004). Instead, an employee seeking a greater award must start from scratch, i.e., the employee must file a Title VII suit and prove liability along with entitlement to relief. *Id.* Given that Herron requested trial on damages only, the court concluded he failed to state a claim. *Id.* at 74, 79. Later, observing that Scott's claim raised "the same legal issues" as Herron's, the district court dismissed it "for the reasons stated in the court's ... order in *Herron v. Veneman.*" *Scott v. Veneman,* No. 03-1560 (D.D.C. June 18, 2004).

Scott now appeals. Because the only issue she presents is legal, our review is de novo. *Second Amendment Found. v. U.S. Conference of Mayors,* 274 F.3d 521, 523 (D.C. Cir. 2001).

II.

As the district court explained, two types of civil actions may arise from Title VII's federal-sector administrative process. *See Herron*, 305 F. Supp.2d at 74-75. First, complainants who prevail in the administrative process but who—for whatever reason—fail to receive their promised remedy, may sue to enforce the final administrative disposition. *See, e.g., Wilson v. Pena*, 79 F.3d 154 (D.C. Cir. 1996) (reversing dismissal of action contending that employing agency used improper performance rating in calculating back pay owed pursuant to EEOC finding of discrimination); *Houseton v. Nimmo*, 670 F.2d 1375 (9th Cir. 1982) (affirming decision requiring employing agency to provide job training awarded in 16-month-old administrative disposition). In such enforcement actions, the court reviews neither the discrimination finding nor the remedy imposed, examining instead only whether the employing agency has complied with the administrative disposition. *See Moore v. Devine*, 780 F.2d 1559, 1563 (11th Cir. 1986). Second, a complainant "aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action" under Title VII. 42 U.S.C. § 2000e-16(c). In a Title VII suit brought after a final administrative disposition finding no discrimination, the district court considers the discrimination claim de novo. *Chandler v. Roudebush*, 425 U.S. 840 (1976).

Challenging only the compensatory damages award, Scott seeks neither to enforce an administrative disposition nor to retry an unsuccessful discrimination claim. Her suit therefore raises this question: May a court review a final administrative disposition's remedial award without reviewing the disposition's underlying finding of liability? According to Title VII's plain language, the answer is no.

Because Scott takes issue with a final administrative disposition—though just a portion of it—her claim arises under 42 U.S.C. § 2000e-16(c), the provision authorizing a cause of action for a party "aggrieved by [a] final disposition." Sec-

tion 2000e-16(c) provides that such "an employee or applicant for employment ... may file a civil action as provided in section 2000e-5," which contains provisions governing actions against private employers, states, and units of local government. Section 2000e-16(d) further specifies that "[t]he provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern" Title VII suits against federal agencies. (The Supreme Court has explained that "[t]he most natural reading of the phrase 'as applicable' in [section 2000e-16(d)] is that it merely reflects the inapplicability of provisions in [section 2000e-5(f) through (k)] detailing the enforcement responsibilities of the EEOC and the Attorney General." *Chandler*, 425 U.S. at 848.)

Critical to the question before us, section 2000e-5(g), one of the provisions applied to federal sector suits by sections 2000e-16(c) and (d), states: "*[i]f the court finds* that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice," it may order various specified remedies, *id.* § 2000e-5(g)(1) (emphasis added). Thus, in a federal-sector Title VII case, any remedial order must rest on judicial findings of liability, and nothing in the statute's language suggests that such findings are unnecessary in cases where a final administrative disposition has already found discrimination and awarded relief. This rule, moreover, applies to Scott's claim even though section 2000e-5(g) says nothing about compensatory damages, for the statute authorizing such damages indicates that section 2000e-5(g)'s requirement of a judicial finding of liability applies to them as well. *See* 42 U.S.C. § 1981a(a)(1) (making compensatory damages available "in addition to" remedies mentioned in section 2000e-5(g)).

The Supreme Court's decision in *Chandler v. Roudebush*, 425 U.S. 840, reinforces this conclusion. Explaining that federal courts should not defer to final administrative determinations finding no discrimination, the Court observed that pursuant to Federal Rule of Evidence 803(8)(c), "[p]rior admin-

istrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo*." 425 U.S. at 863 n.39. Notice that the Court drew no distinction between discrimination claims resolved in favor of the complainant and those resolved against the complainant. In all cases, administrative findings may "be admitted as evidence." Were an administrative finding of liability conclusive, it would, as the district court pointed out, be "unnecessary, and indeed strange," *Herron*, 305 F. Supp. 2d at 77, for the Supreme Court to have stated that "findings with respect to" the claim could "be admitted as evidence."

Chandler is helpful in another respect. The Court explained that the Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, 86 Stat. 103, which extended Title VII to federal employees, sought "to accord [them] the same right to a trial *de novo* as is enjoyed by private-sector employees." 425 U.S. at 848. Requiring federal-sector plaintiffs to prove liability puts them in approximately the same position as private-sector plaintiffs who, unable to obtain legally-binding EEOC findings, *see* 42 U.S.C. § 2000e-5, must litigate both liability and remedy.

In a recent decision examining the issue presented here, the Tenth Circuit reached the same conclusion we do: that Title VII does not permit courts to review administrative dispositions' remedial awards without first determining whether discrimination occurred. *Timmons v. White*, 314 F.3d 1229 (10th Cir. 2003). True, as Scott points out, the Fourth and Ninth Circuits have arrived at the opposite conclusion, but we think the decisions of those circuits are flawed.

In *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), the Fourth Circuit, without "distinguish[ing] between an action for enforcement of a final" disposition and a suit challenging such a disposition, *Timmons*, 314 F.3d at 1236, stated that "defendants are bound by" EEOC "findings of discrimination and retaliation," 801 F.2d at 711 n.3. But *Pecker* failed to

consider Title VII's plain language and relied on two decisions that provide no support for its broad conclusion: *Houseton v. Nimmo*, 670 F.2d 1375, an enforcement action, and *Moore v. Devine*, 780 F.2d 1559, which not only distinguished between enforcement actions and challenges to administrative dispositions, but also, when explaining that courts must enforce EEOC decisions, made clear that it referred only to the former type of case. Later, in *Morris v. Rice*, 985 F.2d 143, 145-46 (4th Cir. 1993), the Fourth Circuit held explicitly that a "plaintiff may limit and tailor his request for *de novo* review ... without exposing himself to a *de novo* review of a finding of discrimination." Yet in *Morris* the court relied primarily on its earlier decision in *Pecker*. *Id.* For additional support, it cited only *Moore* and a Sixth Circuit decision, *Haskins v. Department of the Army*, 808 F.2d 1192 (6th Cir. 1987), where the court had no need to decide whether a plaintiff can seek limited de novo review because the defendant there had conceded liability.

The Ninth Circuit decision, *Girard v. Rubin*, 62 F.3d 1244 (9th Cir. 1995), suffers from precisely the same defects. Like *Pecker* and *Morris*, it fails to examine Title VII's text, relying instead on *Houseton*, *Morris*, *Haskins*, and language in *Moore* referring only to enforcement actions. *Id.* at 1247.

Scott insists that requiring relitigation of liability runs counter to Title VII's policy of encouraging resolution of discrimination complaints at the administrative level. *See West v. Gibson*, 527 U.S. 212, 218-19 (1999) (discussing this policy). Requiring plaintiffs who challenge a remedial award to "relitigate [a final disposition's] finding of discrimination ... would ill serve" this policy, Scott contends, because the requirement "would encourage employees to go directly to court at the first opportunity, instead of running the risk of erroneous, unreasonably low damages ... based on findings of discrimination that would not be enforceable in federal court." Appellant's Br. at 18-19. According to Scott, such a requirement would also "encourage disingenuous behavior

on the part of federal agencies." *Id.* at 20. Agencies could "speak out of both sides of their mouth by accepting liability in the administrative process only to attempt to deny it in the U.S. District Court." *Id.*

We think these policy arguments fail to overcome Title VII's language. As to Scott's first point, Title VII *requires* exhaustion of most administrative remedies. 42 U.S.C. § 2000e-16(c). Complainants must pursue these remedies until the employing agency enters its final action, or for 180 days if the employing agency fails to act before then. *Id.* It may be true, as Scott's counsel asserted at oral argument, that agencies often fail to take final action within 180 days, and that employees may have some incentive to sue when the right to do so accrues. Yet employees also have incentives not to do so: the administrative process could produce a final disposition acceptable to the employee, or if not, it could yield valuable evidence the employee could use in a later lawsuit. Given this, and given Title VII's exhaustion requirement, we think the effect of prohibiting remedies-only suits on an employee's incentive to pursue the administrative process is far from clear—and certainly not clear enough to justify ignoring Title VII's plain language.

As to Scott's second point, we see nothing disingenuous about an employing agency adopting an AJ's liability finding and then disputing liability in court, given that the decision to adopt the finding may well rest in part on the size of the remedial award. In this case, for example, DOA may have accepted the liability finding because it thought the remedy, including the $10,000 compensatory award, was reasonable, or at least not worth contesting. Now faced with the prospect of a larger award, DOA might quite legitimately wish to contest liability.

III.

Under Title VII, federal employees who secure a final administrative disposition finding discrimination and order-

ing relief have a choice: they may either accept the disposition and its award, or file a civil action, trying de novo both liability and remedy. They may not, however, seek de novo review of just the remedial award, as Scott tries to do here. We affirm the judgment of the district court.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALFRIEDA S. CONNOR SCOTT,	)	
Plaintiff,	)	
v.	)	Civil Action 03-01560 (HHK)
ANN M. VENEMAN,	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiff, Alfrieda Connor Scott, personal representative of the Estate of Harold Connor ("Connor"), brings this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., alleging racial discrimination in the denial of Connor's promotion from a GS-14 to GS-15 level. Presently before the court is defendant's motion for judgment on the pleadings, or for summary judgment [#15].

I. BACKGROUND INFORMATION

Connor was employed by the U.S. Department of Agriculture Farm Service Agency. Connor's claim for racially discriminatory non-promotion was tried before an Equal Employment Opportunity Commission ("EEOC") Administrative Law Judge ("ALJ") as part of the *Herron v. Glickman* administrative class action. The ALJ entered a finding of liability and awarded damages in the amount of $10,000. Connor appealed the damages award. The EEOC Office of Federal Operations subsequently vacated the ALJ's findings that were adverse to the class action plaintiffs, but was silent as to Connor's damages award. Connor understood the ruling to

mean that his appeal had been denied and filed a limited request for reconsideration, which was denied. Plaintiff seeks *de novo* review of the compensatory damages award only.

II. ANALYSIS

Defendant moves for judgment on the pleadings or for summary judgment on the grounds that plaintiff fails to state a claim for increased damages because plaintiff has failed to plead or establish a legally cognizable basis for liability. Defendant contends that the ALJ decision upon which plaintiff relies as the basis of liability is not binding on this court because this court has *de novo* review of the administrative decision regarding both liability and damages. Furthermore, defendant maintains that plaintiff cannot rely on the ALJ's liability finding after the EEOC Office of Federal Operations vacated the ALJ's decision. Defendant also argues that the selection of a candidate better qualified than Connor for the promotion was nondiscriminatory.

Plaintiff's opposition to defendant's motion incorporates by reference the arguments made by the plaintiff in a related case, *Herron v. Veneman*, Civ. No. 03-00841 (HHK), in response to the defendant's motion to dismiss. The claims of the plaintiff in *Herron v. Veneman* arose from the same administrative actions as that of the claims of plaintiff in the instant case and involves the same legal issues in the instant case. On February 9, 2004, the court entered an order in *Herron v. Veneman* granting judgment in favor of the defendant and against the plaintiff. Therefore, for the reasons stated in the court's February 9, 2004 order in *Herron v. Veneman*, defendant's motion for summary judgment in the instant case must be granted.

An appropriate order accompanies this memorandum opinion.

Henry H. Kennedy, Jr.
United States District Judge

Dated: June 18, 2004

No. 05-356

In the Supreme Court of the United States

ALFRIEDA S. CONNOR SCOTT, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD CONNOR, PETITIONER

v.

MIKE JOHANNS, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

MARLEIGH D. DOVER
CHARLES W. SCARBOROUGH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a federal employee who obtains an administrative decision finding discrimination under Title VII of the Civil Rights Act but who is not content with the remedy awarded may file a "civil action" under 42 U.S.C. 2000e-16(c) in district court seeking to challenge solely the amount of damages awarded in the administrative process or instead must litigate both liability and remedy de novo in such an action.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

No. 05-356

ALFRIEDA S. CONNOR SCOTT, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD CONNOR, PETITIONER

v.

MIKE JOHANNS, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 409 F.3d 466. The order of the district court (Pet. App. 10a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2005. On August 4, 2005, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 16, 2005, and the petition for a writ of certiorari was filed on September 15, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1972, Congress extended Title VII of the Civil Rights Act of 1964 to protect federal employees. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 111 (42 U.S.C. 2000e-16). Before filing a Title VII suit in federal court, federal employees must exhaust their administrative remedies. See *Brown* v. *GSA*, 425 U.S. 820, 832 (1976). In the Civil Rights Act of 1991, 42 U.S.C. 1981a *et seq.*, Congress expanded the authority of the Equal Employment Opportunity Commission (EEOC) to award appropriate remedies, including reinstatement, backpay, and compensatory damages. See *West* v. *Gibson*, 527 U.S. 212 (1999). In so doing, Congress intended to "encourag[e] quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court." *Id.* at 219.

Like a private-sector employee, a federal employee "aggrieved by the final disposition of his complaint" in the administrative process "may file a civil action as provided in section 2000e-5." 42 U.S.C. 2000e-16(c). In *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), this Court explained that the "civil action" conferred in Section 2000e-16(c) "accord[s] a federal employee *the same right to a trial de novo* as private-sector employees enjoy under Title VII." *Id.* at 864 (emphasis added). Although the *Chandler* Court did not directly address the question whether a federal employee may limit a court's review to those aspects of an EEOC decision that he or she wishes to challenge, the Court indicated that prior administrative findings are not binding in district court, but may "be admitted as evidence at a federal-sector trial *de novo*." *Id.* at 863 n.39.

Unlike federal employees, federal agencies have no right to challenge adverse EEOC decisions in court. The EEOC's regulations specify that "[f]inal action that has not been the subject of an appeal or civil action shall be binding on the agency." 29 C.F.R. 1614.504(a). See *Gibson*, 527 U.S. at 222. Moreover, so long as a federal employee is not seeking any additional relief beyond that granted in an administrative decision, he or she may go into federal court to "enforce" a binding decision "without risking de novo review of the merits." *Girard* v. *Rubin*, 62 F.3d 1244, 1247 (9th Cir. 1995); accord *Moore* v. *Devine*, 780 F.2d 1559, 1563 (11th Cir. 1986). However, where a federal employee rejects an EEOC decision (or an agency's final action), and files a civil action in district court under Title VII, that action prevents the underlying administrative decision from becoming final and "binding on the agency." 29 C.F.R. 1614.504(a). Thus, as the EEOC's regulations make clear, a federal employee who obtains a favorable decision in the administrative process has several choices: (1) accept that decision and the remedy awarded therein; (2) "file a civil action for enforcement" of that decision in district court if he or she believes the agency is not fully complying with it; or (3) "commence *de novo* proceedings" in district court. 29 C.F.R. 1614.503(g).

2. In 1997, Harold Connor (the deceased individual whose estate petitioner represents) and several other African-American employees of the United States Department of Agriculture (USDA) filed a class action lawsuit under Title VII alleging, among other things, the denial of various promotions on account of race. An administrative judge (AJ) held that the USDA had not discriminated on a class-wide basis, but also concluded that the agency had unlawfully denied promotions to Connor

and another employee, Dr. Clifford Herron. The AJ awarded both Herron and Connor GS-15 positions, back pay, attorney's fees, and $10,000 each in compensatory damages. The USDA then issued final decisions accepting the AJ's findings and the relief awarded. Pet. App. 3a.

Following additional administrative proceedings that are not relevant here, both Herron and petitioner filed suit in the United States District Court for the District of Columbia seeking to challenge solely the $10,000 compensatory damage awards. Pet. App. 10a-11a; *id.* at 3a. In *Herron* v. *Veneman*, 305 F. Supp. 2d 64 (D.D.C. 2004), the district court held that a federal employee may not challenge the amount of compensatory damages awarded in an administrative decision without litigating the issue of liability in a trial de novo under Title VII. *Id.* at 74-79. Because Herron requested a trial only on damages, the court held that he failed to state a claim. *Id.* at 79. Following its decision in *Herron*, the district court granted summary judgment to the USDA in this case, because petitioner's suit arose from the same administrative action and involved "the same legal issues" as *Herron*. Pet. App. 11a.

3. The court of appeals affirmed. Pet. App. 1a-9a. The court began by emphasizing that "two types of civil actions may arise from Title VII's federal-sector administrative process." *Id.* at 4a. When federal employees prevail in the administrative process but do not receive their promised remedy, the court recognized that they "may sue to enforce the final administrative disposition." *Ibid.* (citing *Wilson* v. *Pena*, 79 F.3d 154 (D.C. Cir. 1996)). "In such enforcement actions," the court explained, "the [district] court reviews neither the discrimination finding nor the remedy imposed, examining in-

stead only whether the employing agency has complied with the administrative disposition." *Ibid.* In the alternative, when federal employees are "aggrieved by" the administrative disposition of their discrimination claims, the court stated that they may file a "civil action" under Title VII, 42 U.S.C. 2000e-16(c), in which "the district court considers the discrimination claim de novo." Pet. App. 4a (citing *Chandler*, *supra*).

Because petitioner sought to challenge only the compensatory damages award and sought "neither to enforce an administrative disposition nor to retry an unsuccessful discrimination claim," Pet. App. 4a, the court of appeals explained that petitioner's suit raised the question whether a district court may "review a final administrative disposition's remedial award without reviewing the disposition's underlying finding of liability," *ibid.* "According to Title VII's plain language," the court held, "the answer is no." *Ibid.*

The court of appeals pointed out that Title VII authorizes a court to award various remedies only "*[i]f the court finds* that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice." Pet. App. 5a (quoting 42 U.S.C. 2000e-5(g)(1)) (emphasis and brackets added by the court of appeals). Based on this provision, the court concluded that, "in a federal-sector Title VII case, any remedial order must rest on judicial findings of liability, and nothing in the statute's language suggests that such findings are unnecessary in cases where a final administrative disposition has already found discrimination and awarded relief." *Ibid.*

The court of appeals observed that this Court's decision in *Chandler* "reinforces this conclusion." Pet. App. 5a. *Chandler* explained that "courts should not defer to

final administrative determinations finding no discrimination," Pet. App. 5a, but rather should permit "[p]rior administrative findings made with respect to an employment discrimination claim" to "be admitted as evidence at a federal-sector trial *de novo*," *id.* at 5a-6a (quoting *Chandler*, 425 U.S. at 863 n.39). The court of appeals emphasized that *Chandler*'s statement regarding the treatment to be accorded administrative findings in a civil action "drew no distinction between discrimination claims resolved in favor of the complainant and those resolved against the complainant." *Id.* at 6a. "Were an administrative finding of liability conclusive," the court of appeals observed, it would have been "unnecessary, and indeed strange" for the *Chandler* Court to have stated that administrative liability findings may "be admitted as evidence." *Ibid.* (internal quotation marks omitted). The court of appeals also relied on *Chandler*'s conclusion that the purpose of the 1972 amendments to Title VII was "to accord [federal employees] the same right to a trial *de novo* as is enjoyed by private-sector employees." *Ibid.* (quoting *Chandler*, 425 U.S. at 848). "Requiring federal-sector plaintiffs to prove liability" is consistent with that purpose, the court of appeals explained, because private plaintiffs "must litigate both liability and remedy." *Ibid.*

The court of appeals observed that its holding was consistent with a recent decision by the Tenth Circuit, *Timmons* v. *White*, 314 F.3d 1229 (2003), which held "that Title VII does not permit courts to review administrative dispositions' remedial awards without first determining whether discrimination occurred." Pet. App. 6a. While stating that "the Fourth and Ninth Circuits have arrived at the opposite conclusion," the court stressed that "the decisions of those circuits are flawed." *Ibid.*

The court of appeals emphasized that, in *Pecker* v. *Heckler*, 801 F.2d 709 (1986), the Fourth Circuit did not distinguish between enforcement suits and civil actions challenging an administrative disposition, "failed to consider Title VII's plain language[,] and relied on two decisions that provide no support for its broad conclusion." Pet. App. 6a-7a (citing *Houseton* v. *Nimmo*, 670 F.2d 1375 (9th Cir. 1982), and *Moore* v. *Devine*, *supra*). The court of appeals further explained that, in *Morris* v. *Rice*, 985 F.2d 143 (1993), the Fourth Circuit "relied primarily on its earlier decision in *Pecker*." Pet. App. 7a. The court of appeals found the Ninth Circuit's decision in *Girard* v. *Rubin*, 62 F.3d 1244 (1995), equally unpersuasive, because it "suffers from precisely the same defects" as *Pecker* and *Morris*. Pet. App. 7a.

Finally, the court of appeals rejected petitioner's argument "that requiring relitigation of liability runs counter to Title VII's policy of encouraging resolution of discrimination complaints at the administrative level." Pet. App. 7a. The court expressed doubt that a rule requiring relitigation of liability would encourage federal employees to go to court at the earliest available opportunity, because federal employees must exhaust their administrative remedies and because they have strong incentives *not* to abandon the administrative process. *Id.* at 8a. Among other things, the court noted that participation in the administrative process "could produce a final disposition acceptable to the employee, or if not, it could yield valuable evidence the employee could use in a later lawsuit." *Ibid.* Likewise, the court rejected petitioner's argument that requiring plaintiffs to litigate both damages and liability in trials de novo under Title VII would encourage "disingenuous" behavior by federal agencies. *Ibid.* The court of appeals explained that it

saw "nothing disingenuous about an employing agency adopting an AJ's liability finding and then disputing liability in court, given that the decision to adopt the finding may well rest in part on the size of the remedial award." *Ibid.*

ARGUMENT

Petitioner seeks review of the court of appeals' determination that a federal employee who obtains a favorable administrative decision under Title VII may not file a civil action in district court seeking to challenge solely the amount of damages awarded in the administrative process but instead must litigate both liability and remedy de novo. Pet. 11-24. That issue does not warrant this Court's review, because it was correctly decided by the court of appeals and because the Fourth Circuit, the only court of appeals with case law that directly conflicts with the decision below, has granted rehearing en banc to consider whether that precedent should be overruled.

1. a. The court of appeals properly held that a federal employee who is not satisfied with the amount of damages awarded in an administrative decision under Title VII may not seek de novo review of that decision in district court limited solely to the issue of damages. Although federal employees "aggrieved by" an administrative decision (either in whole or in part) may bring a "civil action" in district court, 42 U.S.C. 2000e-16(c), the court may provide a remedy only "[i]f the court finds" that the defendant has unlawfully discriminated, 42 U.S.C. 2000e-5(g)(1).[1] Thus, as the court of appeals cor-

[1] That provision provides, in relevant part:

> **(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judcial orders**

rectly recognized, the language of Title VII plainly requires that "any remedial order must rest on *judicial* findings of liability." Pet. App. 5a (emphasis added). Under petitioner's theory that administrative findings of discrimination are *binding* in a civil action in which the employee challenges only the administrative remedy she received, "judicial findings of liability" would not only be unnecessary but precluded. That result is contradicted by the plain language of the statute.

Petitioner's position is also inconsistent with this Court's decision in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). *Chandler* demonstrates in at least three additional ways that federal employees may not pick and choose among favorable and unfavorable findings in the administrative process by seeking limited de novo review of the remedies awarded while simultaneously treating prior liability findings as conclusive in district court. First, *Chandler* states that the civil action authorized by Section 2000e-16(c) is a "trial *de novo*." *Chandler*, 425 U.S. at 846. That term is generally understood to encompass a new trial on the *entire* case, as if there had been no prior findings. See *id.* at 853-854, 861 (referring to trial de novo as "plenary trial[]" and rejecting a reading of the term "civil action" that would permit "fragmentary *de novo* consideration of discrimination

---

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate.

42 U.S.C. 2000e–5(g)(1).

claims where appropriate") (internal quotation marks omitted); *Timmons* v. *White*, 314 F.3d 1229, 1233 (10th Cir. 2003) (citing definitions of "trial de novo" in cases and *Black's Law Dictionary* (7th ed. 1999)). Second, *Chandler* makes clear that Section 2000e-16(c) "accord[s] a federal employee the same right to a trial *de novo* as private-sector employees enjoy under Title VII." 425 U.S. at 864. That principle would be undermined if federal employees could treat the favorable components of administrative decisions as binding in district court, because private plaintiffs do not typically obtain any administrative resolution of their claims prior to arriving in district court and thus "must litigate both liability and remedy." Pet. App. 6a.

Third, allowing federal employees to seek review in district court limited solely to damages would be inconsistent with the *Chandler* Court's statement that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo*." 425 U.S. at 863 n.39. See *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 112-113 (1991) (citing *Chandler* for proposition that "[a]dministrative findings with respect to the * * * claims of federal employees enjoy no preclusive effect in subsequent judicial litigation"). As the court of appeals recognized, petitioner's contention that administrative findings with respect to liability are conclusive if a federal employee elects not to challenge them in district court cannot be reconciled with *Chandler*'s view that the findings may serve as potential "evidence" in a "trial *de novo*." See Pet. App. 6a.

b. Petitioner makes several attempts (Pet. 18-22) to overcome the plain language of Title VII and *Chandler*. None has any merit. She argues (Pet. 18) first that the

court of appeals' reliance on the language of Section 2000e-5(g)(1) conditioning the award of judicial remedies on a judicial finding of liability is misplaced, because, as the court of appeals recognized, it is well established that "a plaintiff can obtain a remedy without a de novo liability determination by the court" (Pet. 18) in an action seeking to enforce a final remedial order issued in the agency proceedings. However, the court of appeals' recognition that district courts have authority to *enforce* binding agency decisions is fully consistent with its holding that Section 2000e-16(c) does not authorize suits under Title VII seeking damages only. As the EEOC's regulations make clear, a court's authority to enforce administrative decisions flows from the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and the mandamus statute, 28 U.S.C. 1361—not Title VII. See 29 C.F.R. 1614.503(g). Thus, contrary to petitioner's argument, the existence of judicial authority to enforce agency decisions under the APA and the mandamus statute does not override the specific limitations set forth in Section 2000e-5(g)(1) on the courts' authority to award their own remedies in a "civil action" under Section 2000e-16(c).

In a footnote (Pet. 19 n.10), petitioner attempts to discount Section 2000e-5(g)(1) on several additional grounds, arguing that (1) that provision does not apply to suits brought by federal employees, (2) a court may make liability findings based on the agency's findings, and (3) a court's remedial authority is not limited to cases where it also finds liability, at least with respect to awarding attorney's fees. The first contention is baseless because it cannot colorably be argued that Section 2000e-5(g)(1) does not apply to suits brought by federal employees. See *Chandler*, 425 U.S. at 845-848 (applying

Section 2000e-5(g) in discerning the meaning of "civil action" under Section 2000e-16(c)). Petitioner's second contention—that the phrase "[i]f the court finds" in Section 2000e-5(g)(1) could be read to embrace a rule of preclusion—is contrary not only to common sense but also to *Chandler*. See 425 U.S. at 845 (reading the phrase "[i]f the court finds" and other language to "indicate[] clearly that [a] 'civil action'" under Title VII is "a trial *de novo*").

Finally, petitioner's argument that district courts have authority to award remedies such as attorney's fees without making independent findings on liability is incorrect. Although petitioner cites *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), as support for this proposition, Pet. 19 n.10, the plaintiff in *Carey* initially sought relief on the merits of her claims in addition to attorney's fees, see 447 U.S. at 58, and the question "[w]hether Congress intended to authorize a separate federal action solely to recover costs, including attorney's fees" was therefore "plainly not presented." *Id.* at 71 (Stevens, J., concurring). Moreover, this Court has since held in a related context that a suit for attorney's fees is not an action to enforce any of the civil rights laws listed in 42 U.S.C. 1988, and that federal courts are thus not authorized to entertain claims solely for attorney's fees. See *North Carolina Dep't of Transp.* v. *Crest Street Cmty. Council*, 479 U.S. 6 (1986). Following *Crest Street*, the Fourth Circuit has held that district courts lack jurisdiction to entertain Title VII suits solely for attorney's fees. See *Chris* v. *Tenet*, 221 F.3d 648 (4th Cir. 2000), cert. denied, 531 U.S. 1191 (2001).[2]

---

[2] In light of this Court's decision in *Crest Street*, petitioner's reliance on earlier lower court decisions allowing Title VII suits solely for

Petitioner contends next that the court of appeals erred in relying on Congress's intent to "treat private- and federal-sector employees alike" as a justification for requiring federal employees who receive a favorable administrative determination on liability but who seek enhanced remedies to proceed with a trial de novo on both liability and remedies. Pet. 19 (quoting *Chandler*, 425 U.S. at 861). Petitioner points out that Congress "did provide federal employees with certain rights that go beyond those of private-sector employees—in particular, the right to receive *enforceable* remedies from the EEOC, which are *binding* on federal agencies." *Ibid.* But the right at issue here is the right to trial "*de novo*," *Chandler*, 425 U.S. at 863; Congress simply did not bestow on federal employees a right to file an action seeking only to modify administrative remedies. To the contrary, Congress gave federal employees "the right to file a *de novo* 'civil action' equivalent to that enjoyed by private-sector employees." *Ibid.* Cf. *University of Tenn.* v. *Elliott*, 478 U.S. 788, 795-796 (1986) (noting that it "would be contrary to the rationale of *Chandler*" to allow findings by state agencies to have preclusive effect on a private employee's Title VII claim in district court).

Finally, petitioner raises various policy arguments (Pet. 20-22), but they cannot overcome the plain language of Title VII. As this Court explained in *Chandler*, "[i]t may well be * * * that routine trials *de novo* in the federal courts will tend ultimately to defeat, rather than to advance, the basic purposes of the statutory scheme. But Congress has made the choice, and it is not for us to disturb it." 425 U.S. at 863-864. In any event, as the

---

attorney's fees, Pet. 18 n.9 (citing *Fisher* v. *Adams*, 572 F.2d 406 (1st Cir. 1978), and *Booker* v. *Brown*, 619 F.2d 57 (10th Cir. 1980)), is misplaced.

court of appeals explained, petitioner's policy arguments are unpersuasive. See Pet. App. 8a.

2. Petitioner asserts that the circuits are "[d]eeply [d]ivided" on the question presented. Pet. 11. Although it is correct that there is a shallow conflict on this issue, that conflict does not warrant this Court's review.

There is a consensus among the courts of appeals that have recently addressed the question that federal employees who have obtained favorable liability findings in the administrative process under Title VII may not seek de novo review in district court limited solely to the question of damages. In addition to the decision by the District of Columbia Circuit below, both the Tenth Circuit and the Third Circuit have recently issued published decisions holding that federal employees who have prevailed in the administrative process under Title VII may not tailor a civil action in federal court solely to a request for enhanced remedies, see *Timmons*, *supra*; *Morris* v. *Rumsfeld*, 420 F.3d 287 (3d Cir. 2005), and no court of appeals (or district court) has rejected or even questioned the analysis in these decisions.

Petitioner thus relies exclusively on claims of conflict with older decisions in various circuits. Pet. 12-17. As the courts of appeals, *Timmons*, and *Morris* all recognized, however, those decisions are unpersuasive because they either failed to consider the pertinent language of Title VII and *Chandler* or failed to apprehend the critical distinction between actions brought merely to enforce an administrative decision and those brought to obtain new remedies from the district court. See Pet. App. 6a-7a (explaining why contrary decisions "are flawed"); *Morris*, 420 F.3d at 293 & n. 11 (same); *Timmons*, 314 F.3d at 1236-1237 (same). More importantly, as explained below, the vast majority of these decisions do not

squarely hold that a federal employee may bring suit under Title VII solely to seek more damages than the amount awarded in the administrative process, and therefore do not conflict with the decision below.

The only genuine conflict is with two Fourth Circuit decisions, *Pecker* v. *Heckler*, 801 F.2d 709 (1986), and *Morris* v. *Rice*, 985 F.2d 143 (1993). That conflict is not only shallow but may be resolved by the Fourth Circuit itself. The Fourth Circuit recently granted rehearing en banc to consider whether *Morris* and *Pecker* should be overruled. In *Laber* v. *Harvey*, No. 04-2132, a case in which an Army employee attempted to challenge the remedy he received in the administrative process without litigating liability in district court, the Fourth Circuit sua sponte granted rehearing en banc, directing counsel to "be prepared to discuss at oral argument whether existing circuit precedent should be overruled." Order at 1, *Laber* v. *Harvey*, No. 04-2132 (4th Cir. Aug. 3, 2005). In light of the Fourth Circuit's pending en banc reconsideration of this issue (oral argument was heard October 27, 2005), review by this Court predicated on a claim of conflict with Fourth Circuit decisions is unwarranted at this time.

None of the other decisions petitioner relies upon establishes a conflict among the circuits on the question presented. Petitioner contends (Pet. 13-14) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *Girard* v. *Rubin*, 62 F.3d 1244 (1995). But *Girard* did not hold that liability findings in an administrative decision are binding in a damages-only trial in district court; it held only that the government waived a timeliness defense by failing to appeal a prior (and separate) EEOC decision that the complaint was filed within the statute of limitations. 62 F.3d at 1247.

In an unpublished decision, the Ninth Circuit underscored the limited reach of *Girard* while affirming a district court holding that a jury was *not* bound by prior administrative findings favorable to plaintiff in a "trial de novo" under Title VII. See *Friel* v. *Daley*, No. 99-15733, 2000 WL 1208197 (9th Cir. Aug. 24, 2000) ("It is one thing to say that the government loses an affirmative defense by failing to appeal an adverse administrative ruling; it is far different to say that the plaintiff is relieved of proving all the elements of his claim."). Likewise, in a recent published decision, the Ninth Circuit treated the question whether administrative liability findings are subject to de novo review as an open question in that circuit. See *Farrell* v. *Principi*, 366 F.3d 1066, 1068 n.2 (2004) (comparing *Morris* with *Timmons* and reserving judgment on the issue). Thus, the Ninth Circuit itself has not treated *Girard* as dispositive on the question presented and that court has recognized that administrative findings are admissible, but not binding, in a *private* employee's Title VII suit. See *Plummer* v. *Western Int'l Hotels Co.*, 656 F.2d 502 (9th Cir. 1981).[3]

---

[3] Petitioner cites both *Friel* and *Farrell* to support her broad reading of *Girard*. Pet. 14 n.6. But those decisions plainly indicate that *Girard* is limited to circumstances where the government waives its right to litigate an affirmative defense such as timeliness by not appealing a separate EEOC order. Petitioner's reliance on *Briones* v. *Runyon*, 101 F.3d 287 (2d Cir. 1996), Pet. 15, is misplaced for precisely the same reason. That case also involved waiver of a timeliness defense, *not* the question whether an administrative liability finding is conclusive in a trial de novo in district court. Indeed, as petitioner recognizes, Pet. 22-23 n.11, at least one district court in the Second Circuit has expressly held, relying on *Timmons*, that a federal employee may not seek damages in a trial de novo under Title VII without also litigating liability. *St. John* v. *Potter*, 299 F. Supp. 2d 125, 128 (E.D.N.Y. 2004).

Petitioner asserts that the court of appeals' decision in this case "is also irreconcilable with the decision of the Sixth Circuit in *Haskins*," Pet. 14, but in *Haskins* the court expressly noted that, where an employee seeks de novo review of his discrimination claims, "the district court is not bound by the administrative findings." *Haskins* v. *Department of the Army*, 808 F.2d 1192, 1199 n.4 (6th Cir.), cert. denied, 484 U.S. 815 (1987).[4] See *Morris*, 420 F.3d at 293 (distinguishing *Haskins*). Likewise, petitioner's reliance on *Gibson* v. *Brown*, 137 F.3d 992 (7th Cir. 1998), vacated, 527 U.S. 212 (1999), is misplaced not only because the decision was vacated but also because that case was an enforcement action. See 137 F.3d at 993-995 (employee filed suit to enforce agency decision and to obtain compensatory damages that he claimed could not be awarded by EEOC).

Finally, while acknowledging that the First Circuit "has not reached the precise issue posed by this case," Pet. 16; see *Rivera-Rosario* v. *USDA*, 151 F.3d 34, 37 (1st Cir. 1998), petitioner suggests that the decision below conflicts with First Circuit cases allowing the recovery of attorney's fees in district court without requiring the litigation of claims on the merits. Pet. 16-17 (citing *Fischer* v. *Adams*, 572 F.2d 406 (1st Cir. 1978)). As pre-

---

[4] While petitioner emphasizes the statement in *Haskins* that "the factual findings underlying an administrative liability determination must be accepted by the district court if the plaintiff so requests," 808 F.2d at 1200, that statement was made in the context of a case in which the government "did not challenge the liability determination," *ibid.* Indeed, contrary to petitioner's suggestion (Pet. 15 n.7) that the district court "found no liability," the court of appeals concluded that "the district court granted [the employee's] motion for partial summary judgment on the question of Title VII liability since the Army had 'admitted discrimination against the plaintiff.'" 808 F.2d at 1195 (citation omitted).

viously noted, see p.12 & note 2, however, old cases allowing suits solely for attorney's fees under Title VII are of dubious continuing validity in light of this Court's decision in *Crest Street*, and the purported conflict between those cases and the Fourth Circuit's more recent holding that district courts lack jurisdiction to entertain suits solely for attorney's fees, see *Chris*, 221 F.3d at 652, did not move this Court to grant the petition for certiorari in *Chris*. See 531 U.S. 1191 (2001). In any event, there is no conflict between the First Circuit and the District of Columbia Circuit on the distinct question presented by this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
MARLEIGH D. DOVER
CHARLES W. SCARBOROUGH
Attorneys

DECEMBER 2005

3

No. 05-356

IN THE

Supreme Court of the United States

ALFRIEDA S. CONNOR SCOTT, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD CONNOR,

Petitioner,

v.

MICHAEL JOHANNS, SECRETARY OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY

JOSEPH D. GEBHARDT
CHARLES W. DAY, JR.
REBECCA M. HAMBURG
GEBHARDT & ASSOCIATES, LLP
1101 17th Street, N.W.
Washington, DC 20036
(202) 496-0400

SCOTT L. NELSON
Counsel of Record
DAVID C. VLADECK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-1000

Attorneys for Petitioner

December 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Regulations:

INTRODUCTION

The government does not deny that the question presented—whether a federal employee may challenge the relief granted in administrative proceedings under Title VII without relitigating liability—is an important and recurring one, significantly affecting the interests both of federal employees and the federal government. As the cases cited by both sides make clear, the issue arises often in Title VII litigation at both the trial and appellate levels. Indeed, the importance of the issue is only underscored by the government's recent and concerted effort to press its position in the courts of appeals—an effort that first succeeded in a federal appellate court only in 2003, more than 30 years after Title VII was extended to cover federal employees.

Nor does the government dispute that the issue has produced disagreement and squarely conflicting rulings among the federal courts of appeals (as well as many federal district courts). Instead, the government relies principally on its view that its position is correct. It is not surprising that the United States could advance arguments on the merits for its position on an issue that has divided the lower courts, but that is hardly a reason to deny definitive resolution of an important issue on which the circuits are in conflict. Secondarily, the government disparages the split as "shallow." That characterization rests not only on the supposition that the Fourth Circuit will change its mind on the issue, but also on a failure to acknowledge very real differences in the approaches taken by other circuits whose decisions are implicated in the split.

Indeed, the government goes so far as to suggest that there is no conflict between the decision below and the Ninth Circuit's decision in *Girard v. Rubin*, 62 F.3d 1244 (9th Cir. 1995), even though the D.C. Circuit acknowledged that *Girard* "had arrived at the opposite conclusion" and expressly rejected *Girard*'s holding and reasoning. *See* Pet. App. 6a, 7a. Just as in *Girard*, the government here seeks a second bite at the apple to litigate liability issues it not only lost but

failed to contest at the administrative level. The D.C. Circuit allowed the government such a second bite, but the Ninth Circuit, among others, would not.

I. The Circuit Split Is Neither "Shallow" Nor Illusory.

The government acknowledges a "genuine conflict" between, on one hand, the decision below, *Timmons v. White*, 314 F.3d 1229 (10th Cir. 2003), and *Morris v. Rumsfeld*, 420 F.3d 287 (3d Cir. 2005), and, on the other, the Fourth Circuit's decisions in *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), and *Morris v. Rice*, 985 F.2d 143 (4th Cir. 1993). Opp. 15. The government nonetheless urges the Court to disregard this open conflict because, in another case that presents a number of issues (including the issue in this case), the Fourth Circuit ordered an en banc hearing that tersely directed counsel to "be prepared to discuss at oral argument whether existing circuit precedent should be overruled." *Laber v. Harvey*, No. 04-2132 (4th Cir. Aug. 3, 2005).[1]

Pecker and *Morris*, however, remain the law of the Fourth Circuit, and speculation that they may be overruled provides no basis for overlooking the overt and admitted conflict among the circuits they reflect. Moreover, to the extent that the Fourth Circuit thought the issue merited en banc consideration, that only reflects the importance of the issue as well as the Fourth Circuit's recognition of the need to resolve the disagreement among the lower courts reflected in the D.C. Circuit's ruling in this case.[2]

---

[1] Although the court styled its order as one setting the case for "rehearing" en banc, it was a rehearing only in the sense that the panel had already heard argument; there was no panel opinion.

[2] Should the Court consider the Fourth Circuit's disposition of *Laber* to be material to its decision whether to grant certiorari in this case, petitioner respectfully suggests that the Court might wish to hold this petition briefly pending decision in *Laber*, particularly in light of the Fourth Circuit's practice of promptly deciding cases after oral argument. If *Laber* reaffirms *Pecker* and *Morris*, the government itself will undoubtedly seek

(*Footnote continued*)

In any event, the Fourth Circuit is not the only circuit whose rulings cannot be reconciled with *Timmons*, *Rumsfeld*, and the decision below. Most notably, the D.C. Circuit flatly disagreed with the Ninth Circuit's decision in *Girard*. But the government, in stark contrast to the court below, asserts that the decisions are not in conflict because *Girard* was only a case about "waiver" of a statute of limitations defense.

While *Girard* couched some of its analysis in terms of waiver, its reasoning was the same as that of *Pecker* and *Morris*: The court held that the government was bound by administrative findings concerning liability that a federal employee in a Title VII action did not challenge. *Girard* explicitly held that because the EEOC had issued a "binding" decision on the statute of limitations issue, and because "an employee could seek review of parts of a favorable EEOC decision without risking a review of the remainder of that decision," the government was "not entitled to a second bite at the apple in the district court" with respect to liability rulings the employee did not contest. 62 F.3d at 1247.[3] *Girard* expressly relied on *Morris*, which it said held that "final decisions of [the] EEOC are binding on federal agencies and in seeking review an employee may tailor his request for relief." *Id.* As the D.C. Circuit forthrightly acknowledged, its holding cannot be squared with *Girard*. The government's contrary argument requires it to ignore what both *Girard* and the D.C. Circuit said. Indeed, even viewed solely as a "waiver" decision, *Girard* is at odds with the decision below, because in this case the government waived its opportunity to contest

---

resolution of the conflict, and this petition will present the most expeditious means to that end.

[3] The Second Circuit's decision in *Briones v. Runyon*, 101 F.3d 287 (2d Cir. 1996), which adopted *Girard*'s holding, also referred to waiver, but its central holding is that the government cannot be "at war with itself" and insist on a "second bite at the apple" on issues that the plaintiff won at the administrative level, *id.* at 291, the same issue presented here.

liability in the administrative proceedings by failing to respond to the plaintiff's prima facie case, just as much as it waived its limitations defense in *Girard*.

The government's assertion that subsequent Ninth Circuit decisions undercut *Girard* is equally unavailing. *Friel v. Daley*, 230 F.3d 1366 (Table), 2000 WL 1208197 (9th Cir. 2000), in addition to being unpublished and of no precedential weight, holds only that a plaintiff who *asks for a de novo trial on liability* cannot bind the agency to favorable administrative findings. As for *Farrell v. Principi*, 366 F.3d 1066, 1068 n.2 (9th Cir. 2004), that case did not present this issue, and the panel's statement that it did not express an opinion on the issue can hardly overrule *Girard*, which did. Indeed, in the Ninth Circuit, a panel cannot overrule a decision of a prior panel, even if the first panel's decision arguably contains dicta. *Barapind v. Enomoto*, 400 F.3d 744, 751 (9th Cir. 2005) (en banc). *Girard* is the law of the Ninth Circuit, and it is at odds with the decision below.[4]

The government's attempt to distinguish *Haskins v. Department of the Army*, 808 F.2d 1192 (6th Cir. 1987), is equally unavailing. The government quotes a footnote in which the *Haskins* court stated that a plaintiff who asks for a de novo trial on liability is not entitled to rely on favorable administrative fact findings, Opp. at 17 (citing 808 F.2d at 1199 n.4), but it fails to come to grips with the court's holding that when, as in *Haskins*, the plaintiff seeks only additional remedies for the discrimination found at the agency level, "*the factual findings underlying an administrative liability determination must be accepted by the district court if the plaintiff so requests.*" *Id.* at 1200 (emphasis added). The court then proceeded to do exactly that: It accepted the ad-

---

[4] District Court decisions in the Ninth Circuit are consistent with *Girard*. *See Charles v. Dalton*, 1996 WL 53633 (N.D. Cal. Jan. 31, 1996); *Hashimoto v. Dalton*, 870 F. Supp. 1544 (D. Haw. 1994), *aff'd*, 118 F.3d 671 (9th Cir. 1997).

ministrative finding of liability and went on to consider whether the plaintiff was entitled to an additional remedy (ultimately finding that he was not).

The government also mischaracterizes the Seventh Circuit's opinion in *Gibson v. Brown*, 137 F.3d 992 (7th Cir. 1998), *vacated on other grounds sub nom. West v. Gibson*, 527 U.S. 212 (1999), as involving only an "enforcement" action. Opp. at 17. But the government itself admits that in addition to seeking enforcement, the plaintiff sought another remedy—damages—not afforded in the administrative process. *Id.* ("employee filed suit to enforce agency decision *and to obtain compensatory damages* ...") (emphasis added). The Seventh Circuit relied on *Morris* in holding that the plaintiff could pursue the damages claim without relitigating liability because "the EEOC's final determinations of discrimination are binding against government agencies unless the complainant himself seeks de novo review of that finding in federal court." *Id.* at 993. Although the decision no longer has precedential weight because this Court vacated it for an unrelated reason, it illustrates the disagreement among appellate courts that have addressed the issue (as, indeed, does the First Circuit's opinion in *Rivera-Rosario v. U.S. Dept. of Agriculture*, 151 F.3d 34, 37 (1st Cir. 1998), which notes and reserves decision on the conflict). Similarly, the many recent district court opinions reaching opposing conclusions on the issue (*see* Pet. at 22-23 n.11), which the government ignores, underscore the need for definitive resolution of the issue.

Moreover, the decision below is completely inconsistent in principle with decisions holding that a federal employee who prevails in agency proceedings but is denied attorneys' fees in the final agency decision may bring a Title VII action seeking the additional remedy of fees without relitigating liability. *See, e.g., Fischer v. Adams*, 572 F.2d 406 (1st Cir. 1978); *Booker v. Brown*, 619 F.2d 57 (10th Cir. 1980). The government characterizes such holdings as "old cases" and claims that they were effectively overruled by *North Caro-*

lina Department of Transportation v. Crest Street Community Council, 479 U.S. 6 (1986), which held that 42 U.S.C. § 1988 does not permit a stand-alone suit for attorneys' fees. But as a number of courts have held since *Crest Street*, the significant differences between Title VII and Section 1988 make *Crest Street*'s holding inapplicable to Title VII cases. *See, e.g., Slade v. Heckler*, 952 F.2d 357, 360 (10th Cir. 1991) (holding that *Crest Street* "is not dispositive" and that Title VII authorizes a stand-alone action for fees by a federal employee plaintiff).[5]

Unlike Section 1988, which authorizes *a court* to award fees only in an action to enforce specified laws (*see Crest Street*, 479 U.S. at 12), the remedial provisions of Title VII provide for awards of fees *by the EEOC* to plaintiffs who prevail in administrative proceedings as part of the agency's power to award "appropriate remedies." *See* 42 U.S.C. § 2000e-16(b); *see also* 29 C.F.R. § 1614.501(e) (providing for presumptive award of attorneys' fees by EEOC to prevailing plaintiffs). As the First Circuit explained in *Fischer*, a plaintiff who prevails before the EEOC but is wrongly denied attorneys' fees may bring a Title VII action as an "aggrieved party" to recover the "full relief" to which he is entitled—without relitigating liability. 572 F.2d at 411.[6] Nothing in *Crest Street* calls that analysis into question. Under the rea-

---

[5] *See also Aurecchione v. Schoolman Transp. System, Inc.*, 426 F.3d 635 (2d Cir. 2005) (court has jurisdiction over stand-alone suit for attorneys' fees under Title VII); *Jones v. American State Bank*, 857 F.2d 494 (8th Cir. 1988) (same); *Moore v. District of Columbia*, 907 F.2d 165 (D.C. Cir. 1990) (en banc) (*Crest Street* does not overrule *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980)); *Eggers v. Bullitt County School Dist.*, 854 F.2d 892 (6th Cir. 1988) (same).

[6] *Chris v. Tenet*, 221 F.3d 648 (4th Cir. 2000), on which the government heavily relies, is inapposite because there the plaintiff did not *prevail* in the administrative proceedings; he settled. *Cf. Hansson v. Norton*, 411 F.3d 231 (D.C. Cir. 2005) (district court lacks jurisdiction to award fees where fee entitlement arises from settlement at administrative level).

soning of the D.C. Circuit, however, such a plaintiff would be required to relitigate both liability and his entitlement to substantive relief before bringing a fee action.

II. The Decision Below Is Not Correct.

The government's insistence that the decision below is compelled by the plain language of the statute is contradicted by the government's admission that a Title VII plaintiff who prevails in administrative proceedings can bring an "enforcement" action without relitigating the issue of liability. *See* Opp. at 3 (acknowledging that a federal employee "may go into federal court to 'enforce' a binding decision 'without risking de novo review on the merits.'"). If, as the government insists, an "action" under Title VII always meant a trial de novo on liability, in which a court could not grant the plaintiff relief without making its own de novo finding of liability, Title VII would preclude such enforcement actions.

The government's only attempt at an answer is that Title VII enforcement actions are actually not Title VII actions at all, but really APA actions under 5 U.S.C. § 701 *et seq.*, and/or mandamus actions under 28 U.S.C. § 1361. Opp. 11. The government's position, however, is contrary to uniform precedent holding that such enforcement actions *are* actions under Title VII. In the leading case of *Houseton v. Nimmo*, 670 F.2d 1375 (9th Cir. 1982), the Ninth Circuit held that a final agency action in a Title VII case "was the proper subject of an enforcement order" under 42 U.S.C. § 2000e-5(g), which it described as providing that "in [a] Title VII case [a] district court may order appropriate relief." *Id.* at 1378.[7] Likewise, *Moore v. Devine*, 780 F.2d 1559 (11th Cir. 1986), described the case before it as a "Title VII action," and no-

[7] Confirming that it was granting relief under Title VII, the court also affirmed an award of attorneys' fees to the prevailing plaintiff, which would not necessarily have been available in an APA action.

where suggested that an enforcement action arose under any statute other than Title VII.

Most notably, in *Wilson v. Pena*, 79 F.3d 154 (D.C. Cir. 1996), the D.C. Circuit painstakingly analyzed the circumstances under which a plaintiff may bring an enforcement action, and repeatedly made clear that the plaintiff in such an action has "the right to sue under Title VII." *Id.* at 164; *see also id.* at 168 (referring to the plaintiff's "right to sue under Title VII"). Indeed, the principal issue in *Wilson* was how to apply Title VII's statute of limitations to an enforcement action, an issue that would never have arisen if the enforcement action arose under the APA or the mandamus statute. And significantly, the *government* argued that the action in *Wilson* was barred by Title VII's limitations periods, a position flatly at odds with its current assertion that an enforcement action does not arise under Title VII. The court in *Wilson*, moreover, fully accepted the government's premise that Title VII's limitations periods applied; it only disagreed with the government on their application to the particular facts.[8]

Moreover, the suggestion that an enforcement action arises directly under the APA or the mandamus statute rather than Title VII is contrary to both statutes, which generally provide their own remedies only when no other statutory proceeding for judicial review is available. *See* 5 U.S.C. § 704; *Environmental Defense Fund v. Reilly*, 909 F.2d 1497 (D.C. Cir. 1990) (APA review precluded where statute provides its own avenue for de novo district court review); *Heckler v. Ringer*, 466 U.S. 602, 616-17 (1984) (mandamus review available only where there is no other adequate remedy). In view of Title VII's comprehensive authorization of

---

[8] Similarly, in *Loe v. Heckler*, 768 F.2d 409 (D.C. Cir. 1985), the government argued that an enforcement action was barred by Title VII's statute of limitations. The court of appeals, while agreeing that the action was brought under Title VII and subject to its limitations provisions, disagreed with the government about when the period began to run.

judicial remedies to employees "aggrieved" by the outcome of the administrative process, 42 U.S.C. § 2000e-16(c), the suggestion that an enforcement action arises under the general review provisions of the APA or under the mandamus statute is untenable.

The availability of an enforcement action without de novo review of liability also puts to rest the government's contention that the principles of *Chandler v. Roudebush*, 425 U.S. 840 (1976), would be undermined if federal employees could take advantage of binding decisions in their favor in ways that private sector employees (who do not receive binding administrative decisions) cannot. Opp. 10. Of course, an enforcement action provides federal employees with an advantage private employees do not have. The government's acknowledgment that federal employees have the right to bring such actions refutes its suggestion that *Chandler* always requires parity between federal and private employees.

Chandler holds only that Congress did not intend to take away a federal employee's ability to obtain a trial de novo on liability if he is aggrieved by the administrative resolution of the liability issue. And, as the government points out, it further holds that if the plaintiff elects to seek a trial de novo on liability, administrative findings bearing on the issue are not binding, but may have evidentiary effect. Opp. 10. That is a far cry, however, from holding that a plaintiff *must* seek de novo review of favorable, final liability rulings as to which he is *not* aggrieved.

Nor can such a requirement be read into the statute's authorization of judicial remedies when a court "finds" that the agency has engaged in discrimination. Nothing in the statute precludes the possibility of the court finding discrimination based on a binding agency determination that discrimination has occurred, just as the court did in *Haskins* and just as it does in every enforcement action where relief is awarded.

Ultimately, the government's position in this case is that it may defend administrative action (in this case, the denial of

adequate remedies) on grounds different from those that served as the basis for the action—that is, having determined that discrimination occurred and that the proper remedy was the relief awarded, it may now defend the limited relief granted by arguing that no relief at all was warranted because no discrimination occurred. That position is contrary to the most basic tenets of judicial review of administrative action. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943). The government has no answer to this point, and so ignores it.

This case provides a telling illustration of the pernicious consequences of the government's position. Having prevailed in tortuous and lengthy administrative proceedings, in which the government did not even bother to put on witnesses to contest the discriminatory treatment he suffered, Harold Connor died before he could bring this action in court to challenge the remedy. Now that petitioner, Mr. Connor's personal representative, has sought to obtain the full redress to which Mr. Connor was entitled, the government not only insists that she is entitled to no redress unless she re-proves her case—without access to the key witness—but it reserves the right to put on the witnesses it withheld in the proceedings before the agency if she seeks a de novo trial on liability. The government's position makes a mockery of the very administrative proceedings that the statute was designed to foster as an alternative to litigation in court. *See West v. Gibson*, 527 U.S. 212, 218-19 (1999).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
DAVID C. VLADECK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

JOSEPH D. GEBHARDT
CHARLES W. DAY, JR.
REBECCA M. HAMBURG
GEBHARDT & ASSOCIATES, LLP
1101 17th Street, N.W.
Washington, DC 20036
(202) 496-0400

Attorneys for Petitioner

Date: December 2005

(4)

No. 05-356

IN THE

Supreme Court of the United States

ALFRIEDA S. CONNOR SCOTT, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD CONNOR,

Petitioner,

v.

MICHAEL JOHANNS, SECRETARY OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

JOSEPH D. GEBHARDT
CHARLES W. DAY, JR.
REBECCA M. HAMBURG
GEBHARDT & ASSOCIATES, LLP
1101 17th Street, N.W.
Washington, DC 20036
(202) 496-0400

SCOTT L. NELSON
Counsel of Record
DAVID C. VLADECK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-1000

Attorneys for Petitioner

December 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

PETITIONER'S SUPPLEMENTAL BRIEF

The government has filed a letter advising the Court of the Eleventh Circuit's recent decision in *Ellis v. England*, __ F.3d __, No. 05-10957 (Dec. 16, 2005), a case decided after petitioner filed her reply. In *Ellis*, the Eleventh Circuit has weighed in on what it acknowledges is a circuit-split over whether a federal employee may file a Title VII action challenging only the remedy awarded in administrative proceedings. A few points about *Ellis* merit comment.

1. *Ellis*, like the D.C. Circuit's opinion below, recognizes that its holding that a federal employee must relitigate liability in order to challenge a deficient administrative remedy under Title VII is contrary not only to the decisions of the Fourth Circuit in *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), and *Morris v. Rice*, 985 F.2d 143 (4th Cir. 1993), but also to the Ninth Circuit's decision in *Girard v. Rubin*, 62 F.3d 1244 (9th Cir. 1995). *See Ellis*, slip op. at 5-6. Specifically, the Eleventh Circuit observed:

> While some circuits, particularly the Fourth and the Ninth, have read our decision in *Moore*[, 780 F.2d 1559 (11th Cir. 1986),] to allow fragmentary *de novo* review of suits brought, not to enforce an EEOC decision, but rather seeking *de novo* review of that decision, *see Rice*, 985 F.2d at 145; *Pecker*, 801 F.2d at 711 n.3; *Girard*, 62 F.3d at 1247, we do not read *Moore* as permitting such fragmentary *de novo* review.

Id. at 6.

Ellis thus squarely contradicts the government's contention in its brief in opposition that there is no genuine disagreement between decisions adopting the government's position, such as *Ellis* and the decision below in this case, and the Ninth Circuit's opinion in *Girard*. Like the D.C. Circuit in the opinion below, *Ellis* openly acknowledges its rejection of *Girard*'s holding and reasoning.

2. *Ellis* also underscores the importance of the issue, the frequency with which it arises, and the need for definitive resolution of the conflict by this Court. *Ellis* marks the third published appellate decision this year alone on the point, and it reveals that the issue was the subject of an unpublished Eleventh Circuit decision last year as well. *See* slip op. at 4. The large number of appellate decisions addressing the issue, together with the many district court decisions cited in the petition for certiorari, indicates the importance of the issue both to Title VII plaintiffs and to the government.

3. Finally, the Eleventh Circuit's decision reflects the conceptual weakness of the government's position and the opinions of the courts that have adopted it. *Ellis* asserts, without pointing to any specific statutory language, that "the Fourth and Ninth Circuits' approach is contrary to the plain language of Title VII, 42 U.S.C. § 2000e-16(c), which provides for *de novo* review of EEOC decisions." Slip op. at 6. Simultaneously, however, *Ellis* acknowledges that, under *Moore*, a plaintiff *can* bring a Title VII action seeking enforcement of an EEOC decision without relitigating liability anew. *Id.* at 3-4. Nowhere does *Ellis* explain how the "plain language" of § 2000e-16(c)—the source of authority for both types of actions—can simultaneously require and not require a de novo liability determination by a district court before that court may grant a Title VII remedy. *Ellis* demonstrates the hollowness of the "plain language" rationale that is also at the heart of both the D.C. Circuit's decision below and the government's defense of that decision on the merits.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition and reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
DAVID C. VLADECK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

JOSEPH D. GEBHARDT
CHARLES W. DAY, JR.
REBECCA M. HAMBURG
GEBHARDT & ASSOCIATES, LLP
1101 17th Street, N.W.
Washington, DC 20036
(202) 496-0400

Attorneys for Petitioner

Date: December 2005